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REASSESSING THE AVOIDANCE CANON
IN *ERIE* CASES

I. INTRODUCTION

This Article chronicles the Supreme Court's inconsistent use of an avoidance canon in cases construing the substantive rights limitation of the Rules Enabling Act (Enabling Act or REA).¹ It focuses primarily on the avoidance canon as used in cases under the REA branch of the *Erie* doctrine² but also discusses avoidance in other REA contexts. The Article concludes that a reassessment and refocusing of the avoidance canon in Enabling Act jurisprudence is necessary. Avoidance, as used in the REA analysis under *Erie*, has varied over the years, with the Court often construing Federal Rules narrowly to avoid a conflict with state law,³ (and sometimes construing against any meaning that the text and history of the Federal Rule at issue would appear to bear to avoid the conflict⁴), sometimes construing Federal Rules broadly and seeming to reach out to find conflict where conflict was not necessary,⁵ and, most recently, engaging avoidance issues directly, but disagreeing about the extent and nature of an appropriate rule of avoidance under the REA.⁶ If avoidance is appropriate in Enabling Act jurisprudence, and each of the opinions in the Supreme Court's most recent *Erie* case, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,⁷ appears to conclude that some form of avoidance is appropriate,⁸ the Court should identify an appropriate guiding purpose and methodology for avoidance. This Article explores when avoidance is appropriate in Enabling Act jurisprudence and identifies the purposes that should animate avoidance.

Through the REA, Congress delegated to the Supreme Court authority to promulgate prospective rules to govern procedure in the federal courts. Under this

¹ Act of June 19, 1934, § 1 Publ. L. No. 73-415, 48 Stat. 1064 (codified as amended, 28 U.S.C. § 2072 (2006)).

² *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938). See Donald L. Doernberg, "The Tempest": *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, *The Rules Enabling Act Decision That Added to the Confusion – But Should Not Have*, __ AKRON L. REV. __, __ n.9 (noting that the term "Erie doctrine" applies to all vertical choice of law issues, including those under the REA).

³ See, e.g., *Gaspirini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, n.7, 437 & n.22 (1996); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 & n.10 (1980); see also *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-05 (2001) (construing Fed. R. Civ. P. 41(b) narrowly, in part, to avoid abridging, enlarging, or modifying state law and, in part, to avoid violating the federalism principle of *Erie*).

⁴ See, e.g., *Semtek*, 531 U.S. at 501-05; *Walker*, 446 U.S. at 750-51 & n.10.

⁵ See, e.g., *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); Cf. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-32 (1988) (construing federal statute broadly when in potential conflict with state law).

⁶ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); see *infra* notes 281-351, and accompanying text.

⁷ 130 S. Ct. 1431 (2010).

⁸ *Id.* at 1441-42 & nn.7-8 (Scalia, J., opinion of the Court); *id.* at 1450-52 & nn.5-6 (Stevens, J., concurring in part and concurring in judgment); *id.* at 1455-69 & nn.2, 8, 10 (Ginsburg, J., dissenting).

delegation, Congress gave broad authority to the Supreme Court to promulgate general rules of practice and procedure for the federal courts (Federal Rules or Rules⁹), and it elevated the status of properly promulgated, i.e., “valid” Federal Rules. Valid Federal Rules will (1) supersede existing, conflicting procedural statutes of Congress by reason of the provision of the REA often referred to as the “supersession clause”;¹⁰ and (2) preempt state procedure by reason of the Supremacy Clause¹¹ when the Rules of Decision Act (RDA)¹² would otherwise call for federal courts to use state law.¹³

The *Hanna v. Plumer*¹⁴ decision recognized an important doctrinal division between cases presenting potential conflicts between state law and judge-made law and those cases presenting apparent conflicts between state law and congressional statutes or Federal Rules.¹⁵ The *Hanna* Court categorized cases pitting state law and federal judge-made law as implicating a “relatively unguided *Erie* choice” under the Rules of Decision Act (RDA). I refer to these cases as requiring an “RDA analysis.” The *Hanna* Court also recognized that cases involving potential clashes of federal statute or Federal Rules and state law require a different, and less searching analysis.¹⁶ I focus, in this Article, primarily on a subset of this group of cases – cases presenting potential conflicts between state law and Federal Rules promulgated by

⁹ “Federal Rule” or “Rule” refers to rules of procedure promulgated by the Supreme Court pursuant to the Rules Enabling Act process. See 28 U.S.C. §§ 2072-2074 (2006).

¹⁰ The “supersession” clause of the REA authorizes valid Federal Rules to supersede existing, conflicting federal statutes: “All laws in conflict with [Federal Rules promulgated by the Supreme Court] shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b) (2006). See generally Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1033-36 (1989) (discussing the supersession clause and Congress’s 1989 attempt to repeal that clause); Bernadette Bollas Genetin, *The Powers That Be: A Reexamination of the Federal Courts’ Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule*, 57 BAYLOR L. REV. 587, 598-606 (2005) [hereinafter Genetin, *Powers That Be*] (discussing the importance of considering Court and congressional rulemaking authority in apparent clashes between federal statutes and Federal Rules); Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 726-29, 736-46 (2002) [hereinafter Genetin, *Conflicts Between Congressional Statutes and Federal Rules*] (proposing a framework for resolving conflicts between federal statutes and Federal Rules that would include examination of Court’s authority under the substantive rights limitation of the REA); Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1047-49 (1993) (discussing the proposed, but unsuccessful, 1988 amendments to the REA to repeal the supersession clause).

¹¹ U.S. CONST. art. IV.

¹² The Rules of Decision Act was part of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20 § 34, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (2000)). It provides as follows: “The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

¹³ *Hanna v. Plumer*, 380 U.S. 460, 463-65, 469-74 (1965).

¹⁴ 380 U.S. 460 (1965).

¹⁵ *Id.* at 469-74. See also John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 697-99, 718-21 (1974).

¹⁶ *Hanna*, 380 U.S. at 463-65, 469-74.

the Supreme Court under the REA, and I refer to the analysis for these conflicts as requiring an “REA analysis.” *Hanna* established that a Federal Rule will be considered valid, for purposes of an REA analysis, when it is both constitutional¹⁷ and in compliance with the substantive rights limitation of the Rules Enabling Act,¹⁸ which provides that a Federal Rule may not “abridge, enlarge, or modify any substantive right.”¹⁹

Although at the time of the 1934 enactment of the REA, the Court, Congress, and federal rulemakers arguably considered substance and procedure to be easily separable categories, with procedure serving simply as a means of implementing substantive goals,²⁰ commentators have long since concluded that substance and procedure are not mutually exclusive. Instead, they overlap in significant part, thus, rendering the substantive rights limitation of the Rules Enabling Act difficult to define.²¹ Indeed, Professor Doernberg has concluded that “[t]hree quarters of a century after Congress passed REA, we still lack an analytical technique for making the admittedly difficult decisions about whether something is substantive or procedural for REA purposes where rational arguments exist for either characterization.”²²

This is the case, in part, I conclude, because the Court has consistently declined to address the issue. But the failure to derive an adequate translation of the substance-procedure distinction for REA purposes has not resulted in mere doctrinal untidiness. The substance-procedure divide allocates power between

¹⁷ *Id.* at 472 (stating that the “constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)” provides congressional authority to make procedural rules which, “though falling within the uncertain area between substance and procedure, are rationally capable of classification as either”).

¹⁸ *Id.* 472-74. The majority, concurring, and dissenting opinions in *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), likewise each conceded the continuing validity of the *Hanna* framework for REA issues. *Shady Grove*, 130 S. Ct. at 1437 (opinion of the Court); *id.* at 1448-49 (Stevens, J., concurring in part and concurring in judgment); *id.* at 1461 (Ginsburg, J., dissenting).

¹⁹ The substantive rights limitation of the REA provides that “[s]uch rules shall not abridge, enlarge, or modify any substantive right.” 28 U.S.C. § 2072(b).

²⁰ See, e.g., Robert G. Bone, *To Encourage Settlement: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1612-13 (2008) [hereinafter Bone, *To Encourage Settlement*]; Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 893-97 (1999) [hereinafter, Bone, *Process of Making Process*]; Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 804-18 (2010); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945-47, 962 (1987).

²¹ See, e.g., Bone, *Process of Making Process*, *supra* note 20, at 900-02; Main, *supra* note 20, at 810-11 (concluding that “substance” and “procedure” have been codified as though they were dichotomies and “characterized by mutually exclusive and mutually exhaustive categories” when they, instead, constitute an antinomy, in which some laws can be “both substantive and procedural . . . [and some can] be neither substantive or procedural”); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 374-75, 399-409 (2010).

²² Doernberg, *supra* note 2, at ___ n.294

Congress and the Supreme Court,²³ limiting the Court to promulgation of Federal Rules that do not “abridge, enlarge or modify any substantive right.” Failure to identify an adequate analytical method for determining when a Court-created Rule impermissibly impacts substantive rights has led the Court to use avoidance techniques in the various scenarios in which the substantive-procedural distinction arises under the REA: (1) in the context of the Court’s promulgation of Federal Rules;²⁴ (2) in instances in which Federal Rules conflict with congressional statutes;²⁵ and (3) in instances in which Federal Rules are in potential conflict with state law.²⁶ The Court’s use of avoidance in Rule promulgation has resulted in unique costs and benefits. It has permitted promulgation of open-textured Rules that permit nominal transsubstantivity of the Rules,²⁷ but this has only deferred defining the substantive-procedural divide to the Rule interpretation context. Although I focus primarily on the third scenario – instances in which a Federal Rule is in potential conflict with state law (the REA analysis) – I suggest that attending to each of the scenarios that implicate the substantive-procedural divide of the REA is important to understanding the limitations of any one.

The difficulty of articulating an adequate definition of the substantive-procedural divide for purposes of the *Erie* doctrine, resulted in the Court’s development in *Guaranty Trust Co. v. York*²⁸ of a functional “outcome-determinative” test, which, as interpreted uncompromisingly by the Supreme Court, endangered

²³ See, e.g., Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025-26, 1106-07, 1113-14 (1982); Burbank, *supra* note 10, at 1016; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 688; Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 92-94 (1998).

²⁴ Professor Burbank indicates that the original Advisory Committee appointed in 1935 “had no coherent or consistent view of the limitations imposed by the Act’s procedure/substance dichotomy.” Burbank, *supra* note 23, at 1132. Professor Burbank also notes that the Advisory Committee “approached [problems of power] without a shared conception of the [REA’s] limitations, . . . that the resolution of these problems were, therefore, essentially ad hoc. . . , and in applying the [REA’s] limitations, normative considerations took a back seat to practical possibilities.” *Id.* at 1133-35; see also *id.* at 1135-57. Far from using an avoidance rationale consistently to stay comfortably within an acceptable procedural realm, the Advisory Committee sometimes heeded the substantive rights limitation on power and sometimes did not. *Id.*

²⁵ See, e.g., *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95-97 (1991); *Daily Income Fund, Inc. v. Fox*, 424 U.S. 523, 542-44 & n.2 (1984) (Stevens, J., concurring in judgment). Accord Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 731 (concluding that “if [a] Federal Rule appears to clash with a federal statute because it appears to abridge substantive rights impermissibly, the court would, if consistent with the context of statute and Rule, prefer a construction in which the Federal Rule would not impermissibly impact substantive rights”); Kelleher, *supra* note 23, at 442 (emphasizing that the Court has begun to take the “substantive rights limitation more seriously, particularly as a rule of construction and to read Rules narrowly when necessary to avoid infirmity”).

²⁶ See *infra* Sections II.B and II.C.2.a.

²⁷ Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988); Marcus, *supra* note 21, at 394-95, 416-21.

²⁸ 326 U.S. 99 (1945).

the Federal Rules in the context of potentially conflicting state law.²⁹ Indeed, a short twelve years after the promulgation of the original Federal Rules, Charles Clark lamented that, given the “drastic logic” with which the Supreme Court implemented *Guaranty Trust’s* outcome determinative test, “hardly a one of the heralded Federal Rules can be considered safe from attack by shrewd lawyers and obedient lower tribunals.”³⁰ The Court did, in some pre-*Hanna* cases, construe the Federal Rule narrowly to avoid a conflict between Federal Rule and state law,³¹ but that avoidance had curious results for the Federal Rules. Construing Rule and state law to conflict meant, under the virtually absolute conformity ultimately required under *Guaranty Trust*, that state law would apply,³² but, of course, construing the Federal Rule not to conflict also triggered the application of state law. In effect, avoidance may have had some formal benefit in preserving the Federal Rule, but, as a practical matter, it was inconsequential. In either case, the Federal Rule would be subordinated, and state law would apply alone or in tandem with the Federal Rule.³³ Moreover, the Court’s decision to defer to state law under the outcome determinative test resulted in dual meanings for Federal Rules – one that applied in diversity cases and a second in federal question cases.³⁴

The Court ultimately countered with an overcorrection in *Hanna v. Plumer*,³⁵ creating a test for Rule validity under the REA, in event of a conflict between Federal Rule and state law, that established the Federal Rules as virtually invulnerable to suggestions that they might impermissibly abridge, enlarge, or modify substantive rights.³⁶ This had important consequences for Federal Rules: It meant that Federal Rules could be interpreted uniformly; indeed, the *Hanna* Court emphasized that

²⁹ *E.g.*, Bernard C. Gavit, *States’ Rights and Federal Procedure*, 25 IND. L.J. 1, 3, 24-26 (1949); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW U. L. REV. 427, 429-34 (1958); Edward Lawrence Merrigan, *Erie to York to Ragan – A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 711-12, 717-25 (1950); Arthur John Keeffe et al., *Weary Erie*, 34 CORNELL L.Q. 494, 506-09, 513, 525 (1949); Charles E. Clark, *Cases and Materials on Federal Courts*, 36 CORNELL L.Q. 181, 182-84 (1950) (book review).

³⁰ Clark, *supra* note 29, at 183 (1950).

³¹ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-56 (1949); *Palmer v. Hoffman*, 318 U.S. 109, 116-17 (1943). *Cf.* *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201-02 (1956) (using avoidance in apparent conflict between federal statute and state law).

³² *E.g.*, Gavit, *supra* note 29, at 1-3; Hill, *supra* note 29, at 429-37; Merrigan, *supra* note 29, at 717-18, 723-25; Clark, *supra* note 29, at 183.

³³ *See infra* notes 91-152, and accompanying text.

³⁴ *See, e.g.*, Gavit, *supra* note 29, at 3, 25-26; Merrigan, *supra* note 29, at 717-719, 721.

³⁵ 380 U.S. 460 (1965).

³⁶ *See, e.g.*, Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1643 (1998) (noting that “overzealous application of *Hanna* . . . [in *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 5-7 (1987) and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-32 (1988)] was so stark that one might be forgiven for becoming cynical; the tie-breaker in vertical choice of law was that the federal provision wins by invocation of *Hanna*”); John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 289 (2008) (describing the “really regulates procedure” principle of *Hanna* as “a test the rules cannot fail”).

uniformity of application was “[o]ne of the shaping purposes of the Federal Rules.”³⁷ A Federal Rule would be considered valid after *Hanna* if the Rule “really regulate[d] procedure, the judicial process for enforcing the rights and duties recognized by substantive law, and for justly administering remedy and redress for disregard or infraction of them”³⁸ an illusory standard that drew immediate and consistent criticism³⁹ (but which a plurality of the Supreme Court has reaffirmed in the *Shady Grove* opinion⁴⁰). The hoped-for uniformity, however, has not materialized.

In the post-*Hanna* context, avoidance could play a major role as the Court itself illustrated in the *Hanna* opinion,⁴¹ and, in post-*Hanna* cases, the Court has regularly invoked an avoidance canon, this time to prevent the potential overprotection of the Federal Rules (and consequent underprotection of state substantive law) under the Rule-protective standard for validity established in *Hanna*. The Court’s construction of the scope of a Federal Rule – or whether the Rule “cover[ed] the point in dispute”⁴² -- however, has varied in post-*Hanna* cases, and its use of an avoidance canon of Rule interpretation has been uneven. Commentators have suggested, moreover, that the Court’s recent use of an avoidance canon⁴³ not only avoids conflict between Federal Rule and state law, but it essentially rewrites the Federal Rules at issue in order to avoid the conflict.⁴⁴ Others have concluded that the Court’s use of avoidance has taken on an *ad hoc* quality that provides little guidance to lower courts.⁴⁵ A slim majority of the Supreme Court has signaled in *Shady Grove* that it will abandon that use of the

³⁷ *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (quoting *Lumbermen’s Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)). See also *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987) (indicating that the “cardinal purpose” of Congress in enacting the REA was “the development of a uniform and consistent system of rules governing federal practice and procedure”).

³⁸ *Hanna*, 380 U.S. at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

³⁹ See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1453 n.7 (Stevens, J., concurring in part and concurring in judgment) (citing and approving scholarly criticism of the standard). See also Doernberg, *supra* note 2, at page 19 of 43; John C. McCoid, II, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 887, 901-04 (1965)

⁴⁰ *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442-43 (2010).

⁴¹ 380 U.S. at 470 & n.12.

⁴² *Id.* at 470. Whether a Rule and state law are in conflict has been variously articulated, including whether “when fairly construed, the scope of . . . the Federal Rule . . . is ‘sufficiently broad’ to cause a ‘direct collision’ with the state law or, implicitly to ‘control the issue’ before the court, thereby leaving no room for the operation of state law.” *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987).

⁴³ *Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-05 (2001); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436-37 & n.22 (1996).

⁴⁴ See, e.g., Earl C. Dudley, Jr., & George Rutherglen, *Deforming the Federal Rules: An Essay on What’s Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707, 708, 727 (2006); see also Stephen B. Burbank, *Semtek, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1042-46 (2002); Ralph U. Whitten, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: Justice Whitten, Nagging in Part and Declaring a Pox on All Houses*, 44 CREIGHTON L. REV. 115, 118-24 (2010).

⁴⁵ See, e.g., Dudley & Rutherglen, *supra* note 44, at 708, 727 (noting that the Court has resorted to “case-by-case determinations” and to “ad hoc departures from the literal terms of a Federal Rule and its commonly understood meaning “to resolve *Erie* issues implicating the Federal Rules).

avoidance canon,⁴⁶ but the remaining justices would pursue avoidance out of respect for important state interests and regulatory policies.⁴⁷

In summary, in a post-*Hanna* world, much rides on a court's determination of whether the scope of a Federal Rule, "when fairly construed," is "sufficiently broad" to cause a 'direct collision' with the state law or, implicitly, to 'control the issue before the court,' thereby leaving no room for the operation of that law."⁴⁸ The "conflict" decision mediates between use of the RDA analysis, which virtually assures primacy of state law, and use of an REA analysis, which, under either the "really regulates procedure" principle of *Hanna*⁴⁹ or the seemingly more searching inquiry into whether a Rule "affects[s] litigants' substantive rights" more than "incidentally" under *Burlington Northern Railroad Co. v. Woods*,⁵⁰ has virtually assured that the Federal Rule will preempt state law. Two strands of avoidance have emerged in the Court's recent REA cases under *Erie*: (1) avoidance based primarily on an intent to "interpre[t] the federal rules to avoid conflict with important state regulatory policies"⁵¹ and sometimes incorporating a type of interest balancing approach; and (2) avoidance resembling more nearly the canon to construe against serious constitutional doubts and guided by goals of preventing "arguabl[e] violat[ion] of the jurisdictional limitation of the Rules Enabling Act" and violation of the "federalism principles of *Erie*."⁵²

I reach two primary conclusions regarding the avoidance canon in this Article. Preliminarily, an avoidance canon is inadequate, standing alone, to satisfactorily divide substance and procedure for purposes of the REA. An avoidance principle necessarily presupposes some shared understanding of the standard to be avoided. Although commentators have celebrated the Court's use of an avoidance canon of Rule interpretation as signaling the Court's intent to take substantive rights in the Rules Enabling Act more seriously,⁵³ the Court must

⁴⁶ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440-42 & nn.7-8 (2010) (opinion of the Court); *id.* at 1451-52 (Stevens, J., concurring in part and concurring in judgment).

⁴⁷ *Id.* at 1461-1469 (Ginsburg, J., dissenting).

⁴⁸ *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987) (citing *Walker v. Armco Steel. Corp.* 446 U.S. 740, 749-50 & n.9 (1980) and *Hanna v. Plumer*, 380 U.S. 464, 471-72 (1965)).

⁴⁹ *Hanna*, 380 U.S. at 464.

⁵⁰ *Burlington Northern*, 480 U.S. at 5-6 (citing *Hanna*, 380 U.S. at 464-65; *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946); 19 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4509, at 145-46 (1982)).

⁵¹ *See, e.g.*, *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436-37 & n.22 (1996). *See also* Lynch, *supra* note 36, at 321-26 (proposing comparative impairment for resolving conflicts between Federal Rules and state law, in the limited context of state litigation reform legislation); McCoid, *supra* note 39, at 912-14 (suggesting that the *Hanna* Court should have used a comparative impairment analysis).

⁵² *Semtek*, 531 U.S. at 503-04.

⁵³ *See, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1712-14, 1736-37 (2004); Genetin, *Powers That Be*, *supra* note 10, at 592; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 728 & n.241; Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 442 (2000).

develop an administrable means of applying the substance-procedure distinction of the REA. Identifying a proper standard is beyond the scope of this Article, but among the likely candidates are proposals of Justice Scalia and Justice Stevens in the *Shady Grove* opinion, the standard established in *Burlington Northern Railroad Co. v. Woods*,⁵⁴ and recent suggestions in scholarly commentary.⁵⁵

Second, the varying rationales for avoidance should be unified and recalibrated to serve the separation of powers goals that underlie Congress's inclusion of the substantive rights limitation in the REA. Further, the Court should develop an avoidance canon analogous to the so-called "serious doubts" or "modern" avoidance canon of statutory construction that prefers an interpretation of a statute, when possible, that will avoid serious constitutional doubts.⁵⁶ Correspondingly, in the REA context, the Court should construe a Federal Rule that is in potential conflict with state law to avoid serious questions regarding a Rule's violation of the substantive rights limitation of the REA, but only if there is a plausible interpretation of the Rule that would permit avoidance. In determining whether avoidance is permissible, the Court should, in line with its use of avoidance in other Enabling Act contexts,⁵⁷ construe a Rule in accord with the Rule's text, history, and purposes, as set forth in the Advisory Committee Notes.⁵⁸

⁵⁴ 480 U.S. 1, 4-5 (1987).

⁵⁵ Justice Scalia, writing for a plurality in *Shady Grove* would adhere to a standard of whether a Rule "really regulates procedure." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (Scalia, J., plurality opinion). Justice Stevens, in concurrence in *Shady Grove*, suggests that the substantive rights limitation precludes Federal Rules that "would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 130 S. Ct. at 1452-53 & n.8-9 (Stevens, J., concurring in part and concurring in judgment). In *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 5 (1987), the Court held that "[t]he cardinal purpose of Congress in authorizing development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate . . . [the substantive rights] provision if reasonably necessary to maintain the integrity of that system of rules." Professor Doernberg submits two suggestions, which he refers to as the "elements" approach and the "behavioral" approach, that are each likely candidates for this position. Doernberg, *supra* note 2, at ___. Under the "elements" approach, the court would consider whether the state law and Federal Rule at issue "tend to establish or negate an element of the claimant's cause of action or a defense on the merits." *Id.* at ___. A court following the "behavioral" approach would ask "whether, before the litigation began and assuming the parties were fully aware of the competing rules, they would rationally have ordered their conduct in accord with one of the rules." *Id.* at ___.

⁵⁶ See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 138-39 (2010); Adrian Vermeule, *Saving Constructions*, 15 GEO. L.J. 1945, 1949 (1997); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1575-76 (2000).

⁵⁷ See *infra* notes 223-259, and accompanying text.

⁵⁸ Compare Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1124-41, 1147 (2002) (suggesting that the nature of the Enabling Act process and reality of the rulemaking process counsel restraint in Court construction of Federal Rules, that the Court consider the Enabling Act process, and that it "give[] authoritative weight to the Advisory Committee Notes"), with Moore, *supra* note 10, at 1047-53 (1993) (proposing that the Supreme Court use an active or dynamic interpretation of the Rules it promulgates). See also Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 48-49

Section II of this Article traces the Court’s use of an avoidance canon in *Erie*, REA cases⁵⁹ and in non-*Erie*, REA cases.⁶⁰ Section II dwells on the pre-*Hanna* period, reminding that the Court’s use of outcome-determinative principles under *Guaranty Trust* minimized the pre-*Hanna* role of avoidance,⁶¹ subordinated Federal Rules to state law, and resulted in differing interpretations of Federal Rules in diversity and federal question cases. Section II then examines avoidance in post-*Hanna*, *Erie* cases. In these cases, the Court has generally construed Federal Rules narrowly with sensitivity to important state interests and regulatory policies. This federalism focus for avoidance permits state law to override Federal Rules and permits the “two plain meanings” for Federal Rules that commentators disparage in the Court’s post-*Hanna* avoidance decisions.⁶² It, thus, permits replication, Rule-by-Rule, of *Guaranty Trust*’s outcome-determinative results -- subordination of Federal Rules and dual interpretations of Federal Rules in diversity and federal question cases. Section II, finally, examines the Court’s use of avoidance in non-*Erie*, REA cases in which the Court has generally used serious doubts avoidance and has adopted saving constructions of Federal Rules that are more faithful to Rule text and Rule purposes and history as set forth in Advisory Committee materials.

Section III examines the views in the plurality, concurring, and dissenting opinions in *Shady Grove* regarding the extent and nature of an appropriate avoidance canon. In these opinions, the Justices draw on elements of the Court’s historical use of avoidance in REA cases to suggest three competing avoidance principles. Justice Scalia, in dicta, proposes a type of “classical” or “narrow” avoidance;⁶³ Justice Stevens, in concurrence, suggests a broader avoidance canon modeled on “serious doubts” principles, which would counsel avoidance if the most natural construction of a Rule would raise serious doubts about the Rule’s validity under the REA;⁶⁴ and Justice Ginsburg, in dissent, advocates avoidance based almost solely on respect for important state interests and regulatory policies.⁶⁵

In Section IV, I conclude that avoidance in REA cases under *Erie* should be based on separation of powers principles and should incorporate a serious doubts methodology. This includes aspects of Justice Stevens’s approach in *Shady Grove*. I

(2010) (advocating that unless a Federal Rule “actually makes a policy choice that Congress has had an opportunity to review [following its prescribed Enabling Act process] . . . the role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized” and emphasizing as well that “many, if not most, of the Federal Rules are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges”).

⁵⁹ See *infra* notes 91-152 and 186-220, and accompanying text.

⁶⁰ See *infra* notes 223-259, and accompanying text.

⁶¹ Although the Court limited the outcome determinative principle of *Guaranty Trust* in its decision in *Byrd v. Blue Ridge Rural Electric Coop.*, 356 U.S. 525 (1958), the Court did not use avoidance in REA cases between the *Byrd* and *Hanna* cases.

⁶² See *supra* note 197, and accompanying text.

⁶³ See *infra* notes 308-313, and accompanying text.

⁶⁴ See *infra* notes 322-338, and accompanying text.

⁶⁵ See *infra* notes 346-353, and accompanying text.

also discuss the advantages of a serious doubts avoidance model for Rule construction.

II. AVOIDANCE IN ENABLING ACT CASES

In many ways, avoidance has, from the very enactment of the Rules Enabling Act, been the defining characteristic of the Court's construction of the substantive-procedural divide in the REA, in general, and in the REA branch of the *Erie* doctrine, in particular. Professor Burbank relates that, from the start, the original rulemakers lacked a coherent view of the dividing line between substance and procedure.⁶⁶ In promulgating the original Federal Rules pursuant to the REA, the rulemakers, thus, avoided the substantive-procedural divide, in some instances, by incorporating state law⁶⁷ or existing federal law (based on federal statutes and federal common law)⁶⁸ into a Federal Rule and, in other instances by promulgating general Rules that conferred broad, general discretion on trial judges.⁶⁹ In amending the Rules, contemporary rulemakers often avoid promulgating Rules that might be construed as substantive⁷⁰ and promulgate discretionary Rules that leave normative decisions to trial court judges.⁷¹

Similarly, in construing potential Federal Rule-state law conflicts under *Erie*, the Court has often avoided addressing the substantive-procedural divide. This Section traces the history of the Court's use of avoidance in Enabling Act cases. Section II.A lays the groundwork by discussing the substantive rights limitation of the REA. Sections II.B and C examine the avoidance canon, as the Court has employed it in pre-*Hanna*, *Erie* cases, in its post-*Hanna*, *Erie* cases, and in other Enabling Act contexts. Sections II.B. and C reveal that, under the outcome-determinative standard of *Guaranty Trust*, Federal Rules appeared uniformly to yield to conflicting state law, and the Court occasionally used avoidance as a means of protecting the Federal Rule.⁷² The Supreme Court ultimately reaffirmed the superiority of valid Federal Rules over conflicting state law in *Hanna v. Plumer* and set a fairly high bar for finding Rules invalid under the REA.⁷³ Rather than using *Hanna's* stringent standard to override conflicting state law, however, the Court has used avoidance based on federalism principles and construing Rules narrowly (and sometimes

⁶⁶ Burbank, *supra* note 23, at 1332-37, 1145-46.

⁶⁷ *Id.* at 1145-47.

⁶⁸ *Id.* at 1147-57.

⁶⁹ Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324 (2008) [hereinafter Bone, *Making Effective Rules*]; Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1967-68, 1972-73 (2007) [hereinafter Bone, *Who Decides?*]

⁷⁰ *See, e.g.*, Marcus, *supra* note 21, at 413-14.

⁷¹ *See, e.g.*, Bone, *Making Effective Rules*, *supra* note 69, at 326-37; Bone, *Who Decides?*, *supra* note 69, at 1974-75; Burbank, *supra* note 27, at 715; Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473-75 (1987) (book review); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One-Size-Fits-All" Assumption*, 87 DENV. L. REV. 377, 391 (2010).

⁷² *See infra* notes 91-161, and accompanying text.

⁷³ *Hanna v. Plumer*, 380 U.S. 460, 472-74 (1965).

contrary to text and accompanying Advisory Committee Notes) to find that Federal Rule and state law do not conflict. This results in state law controlling under an RDA analysis and can, Rule-by-Rule, reintroduce the outcome determinative results of *Guaranty Trust*. Section II concludes by showing that this method of avoidance has threatened the integrity of the Federal Rules as a coherent system, and that the method varies from the avoidance canon the Court uses in its non-*Erie*, REA cases.

A. *The Substantive Rights Limitation of the REA*

In the original Rules Enabling Act, Congress delegated authority to the Supreme Court to promulgate general rules of practice and procedure for the lower federal courts, but it limited that authority to promulgation of Rules that would not “abridge, enlarge or modify any litigant’s substantive rights.”⁷⁴ The prohibition on Court-made Rules that impermissibly impact substantive rights has been modified by amendment to the REA and today provides as follows:

The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts

Such rules shall not abridge, enlarge or modify any substantive right. . . .⁷⁵

Professor Burbank’s scholarship has been instrumental in clarifying that the substantive rights prohibition was originally included in the REA as a separation or allocation of powers provision.⁷⁶ The substantive rights limitation was intended to separate the permissible bounds of the Supreme Court’s prospective procedural rulemaking from the impermissible substantive realm, in which Court rulemaking would trench impermissibly on Congress’s substantive lawmaking prerogative.⁷⁷ The REA, thus, delegates Congress’s prospective procedural lawmaking authority to the Court,⁷⁸ but it also confines Court rulemaking to the procedural and, moreover, to procedural Rules that do not “abridge, enlarge, or modify any substantive right.”⁷⁹

⁷⁴ Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

⁷⁵ 28 U.S.C. § 2072 (2006).

⁷⁶ See, e.g., Burbank, *supra* note 23, at 1025-26, 1106-14.

⁷⁷ *Id.*

⁷⁸ Through the REA, Congress delegated to the Supreme Court its power to create procedural rules for the federal courts. The Supreme Court has long recognized that Congress has the power, under Articles I and III of the Constitution, to make procedural rules. Article I authorizes Congress to “constitute Tribunals inferior to the Supreme Court,” see U.S. CONST., art 1, § 8, cl.9, and also authorizes Congress to enact all laws necessary and proper to execute the powers vested in it by the Constitution. See U.S. CONST. art. 1, § 8, cl.18. Article III also permits Congress to “vest judicial Power . . . in such inferior courts as Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. The Supreme Court has also long recognized that Congress has the power to delegate procedural rulemaking authority to the Supreme Court. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 386-88 (1989); *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 42-45 (1825).

⁷⁹ See, e.g., Burbank, *supra* note 23, at 1107-08 (concluding that the first sentence of the REA, which authorizes the Court to promulgate “general rules of practice and procedure” imposes significant,

Originally, there was little need for Congress to patrol this divide carefully. Congress, the Court, and commentators shared a vision of a fairly abrupt divide between substance and procedure.⁸⁰ Procedure, they concluded, was different in kind and subservient to substantive law.⁸¹ The Supreme Court, moreover, enjoyed expertise in procedural matters. Thus, for nearly forty years after the enactment of the REA, Congress entered a period of rulemaking passivity, in which it deferred to the procedural expertise of the Supreme Court and generally declined to enact substantive legislation that included procedural provisions, declined to enact amendments to Federal Rules promulgated by the Court, and declined to object to Federal Rules promulgated by the Supreme Court.⁸²

In the then-existing climate of congressional forbearance in procedural rulemaking, the role of the substantive rights provision in creating a boundary that allocated prospective lawmaking authority between the Court and Congress blurred. Court Rules were generally considered the equivalent of statutes.⁸³ Moreover, given Congress's acquiescence in Court rulemaking, conflicts between congressional statutes and Federal Rules, which I have previously referred to as "statute-Rule conflicts,"⁸⁴ rarely arose.⁸⁵ In the few instances in which such conflicts did arise, the question of the Court's rulemaking authority under the substantive rights provision of the REA, though not nonexistent, assumed lesser importance, not only because of the relative infrequency of statute-Rule conflicts, but also because of the prevailing assumptions of Court expertise and broad rulemaking authority and the seeming triviality of the issues that arose.⁸⁶

procedural restrictions on Court rulemaking and that the second sentence, which contains the prohibition that Rules may not "abridge, enlarge or modify any substantive right," is not an independent limitation, but is essentially "surplusage").

⁸⁰ Bone, *Who Decides?*, *supra* note 69, at 1971-72; Bone, *Process of Making Process*, *supra* note 20, at 894-96; Subrin, *supra* note 20, at 945-47, 962. Toward the end of this time period, the idea of a strict separation between substance and procedure was receding, but the proponents of the REA persisted in seeking passage of a bill premised on a dichotomy between substance and procedure.

⁸¹ See, e.g., Bone, *Process of Making Process*, *supra* note 20, at 894-96.

⁸² 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1001 (3d ed. 2010); Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 694-96

⁸³ 4 WRIGHT & MILLER, *supra* note 82, at 1030 & n.1; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 680-82, 701-05 (discussing how courts typically resolve clashes between a congressional statute and Federal Rule through an "implied repeal analysis," in which the courts often treat the statute and Rule as though they were two provisions created by the same lawmaker, rather than provisions of lawmakers with uneven authority).

⁸⁴ *Id.* at 681.

⁸⁵ *Id.* at 751.

⁸⁶ *Id.* at 751 & n.343 (indicating that the few applications of the supersession clause included appellate rules that superseded legislation regarding time to appeal, whether printing costs were taxable, and certain fees in admiralty appeals). Professors Burbank and Wolff suggest as well that the Court may have believed that a federalism perspective could enhance its rulemaking power and the integrity of the Rules. See Burbank & Wolff, *supra* note 58, at 29.

During the forty years in which congressional procedural passivity limited the importance of the substantive rights provision as an arbiter of potential congressional statute-Federal Rule conflicts, however, the role of the substantive rights provision of the REA was assuming increasing importance in *Erie* cases. Although federalism interests are not irrelevant in inquiries regarding the Court's compliance with the substantive rights limitation of the REA, they are furthered not as a primary purpose of the REA's substantive rights limitation, but as a secondary effect of that allocation.⁸⁷ That is, to the extent that Congress does not enact legislation in an area and to the extent that the Court does not promulgate Rules, or rulemaking would intrude on Congress's substantive legislative prerogative (e.g., to the extent that Court Rules would abridge, enlarge or modify any substantive right), state law, if any, will govern. Of course, in some cases, the Federal Rule at issue may be augmented by federal common law, which would also override state law.⁸⁸ Nevertheless, at least in part because of the few opportunities, from 1938 to the 1970s, to consider the separation of powers purposes of the REA in confrontations between congressional statutes and Federal Rules,⁸⁹ the stage was set for the Court, in its *Erie* cases, to key on the secondary federalism aspects of the substantive rights limitation rather than the primary separation of powers purposes. Indeed, federalism purposes have long animated the Court's avoidance canon in *Erie* cases,⁹⁰ and it is only in the plurality and concurring opinions of *Shady Grove* that the Court has begun to deemphasize federalism interests in its avoidance analysis.

B. *The Avoidance Canon in Erie's Pre-Hanna Cases*

In pre-*Hanna* cases featuring Federal Rule-statelaw conflicts, the Supreme Court used an avoidance canon sporadically to avoid resolving substantive-procedural issues, but avoidance had little practical significance. Working to offset the practical import of any avoidance canon of Rule interpretation were two significant decisions that put the integrity of the Federal Rules as a coherent unit in jeopardy – *Guaranty Trust Co. v. York*,⁹¹ which introduced the outcome-determinative principle that would dominate *Erie* jurisprudence until 1958,⁹² and *Ragan v. Merchants Transfer & Warehouse Co.*,⁹³ which applied outcome determination in the context of a Federal Rule and concluded that state law would control.⁹⁴ After *Guaranty Trust*, avoidance

⁸⁷ Burbank, *supra* note 23, at 1025-26, 1106-12.

⁸⁸ *Id.*; Genetin, *Powers That Be*, *supra* note 10, at 591-92, 610-12.

⁸⁹ Henry P. Chandler, *Major Advances in the Federal Judicial System*, 31 F.R.D. 307, 514-15 (1963); Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 & n.40 (1958); Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 751 & n.351.

⁹⁰ *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001); *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 & n.7, 436-37 (1996); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-52 & nn.12-13 (1980).

⁹¹ 326 U.S. 99 (1945).

⁹² In 1958, the Supreme Court reduced the impact of *Guaranty Trust's* outcome-determinative principle when it introduced an interest balancing approach in *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958).

⁹³ 337 U.S. 530 (1949).

⁹⁴ *Id.*

became the better part of Rule validity in pre-*Hanna* cases.⁹⁵ It was an ineffective kind of avoidance that the Court adopted, however, that could not protect the Federal Rule as a practical matter: If a Federal Rule were construed narrowly to avoid conflict with state law, the Federal Rule survived as a formal matter, but both Federal Rule and state-law controlled because, absent a conflict, courts applied state law under the outcome-determinative principle of *Guaranty Trust*.⁹⁶ If, however, Federal Rule and state law did conflict, the state law also controlled, based on application of *Guaranty Trust's* outcome determinative formulation.⁹⁷ Thus, the Federal Rules were consistently on the losing end of the tossup in a paradigmatic heads-I-win, tails-you-lose scenario. The uniformity, predictability, and coherence of procedure in the federal courts sought by Congress through the Federal Rules were immediately imperiled, and Judge Charles Clark's lamentation that "hardly a one of the heralded Federal Rules can be considered safe from attack" reflected reality.⁹⁸

The Court first used avoidance in Rule interpretation in the 1943 case of *Palmer v. Hoffman*,⁹⁹ at a time (before the *Guaranty Trust* decision) when the Court approached *Erie* issues by determining if an issue was substantive or procedural.¹⁰⁰ Avoidance mattered. If the issue were deemed procedural, the Federal Rule would prevail over state law in event of conflict;¹⁰¹ if deemed substantive, state law would govern in event of conflict.¹⁰² In *Palmer*,¹⁰³ the Supreme Court avoided finding a conflict between Fed. R. Civ. P. 8(c), which seemed to catalogue affirmative defenses, and state law, which allocated the burden of proving contributory negligence. The Court determined that the issue of burden of proof was substantive.¹⁰⁴ Absent avoidance, state law would have controlled. Avoidance was, thus, used to shield the Federal Rule, rather than to protect "important state interests" or "regulatory policies."¹⁰⁵ The Court's analysis paralleled what scholars have referred to, in the constitutional avoidance context as "narrow" or "classical avoidance,"¹⁰⁶ under

⁹⁵ *E.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-56 (1949); *cf.* *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (employing avoidance in a case of apparent federal statute-state law conflict); *see also id.* at 207-08 (Frankfurter, J. concurring); *see also Gavit, supra* note 29, at 1, 3; Hill, *supra* note 29, at 429-34 (emphasizing that Federal Rules and statutes were imperiled under rigid application of outcome-determinative principles); Merrigan, *supra* note 29, at 711-12, 721-23.

⁹⁶ *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *see also e.g., Cohen*, 337 U.S. at 555-56.

⁹⁷ *See, e.g., Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

⁹⁸ Clark, *supra* note 29, at 183-84. *See also infra* notes 114-161, and accompanying text.

⁹⁹ 318 U.S. 109 (1943).

¹⁰⁰ *See, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-11 (1941).

¹⁰¹ *Id.* at 10-11.

¹⁰² *Id.*

¹⁰³ 318 U.S. 109 (1943).

¹⁰⁴ *Id.* at 116-17.

¹⁰⁵ Some contemporary cases incorrectly reference *Palmer v. Hoffman* for the proposition that it evidences avoidance to protect important state interests and regulatory policies. *See, e.g., Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1462, 1468 (2010) (Ginsburg, J., dissenting); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).

¹⁰⁶ The so-called "narrow" or "classical" avoidance is also referred to as the "unconstitutionality" canon. It provides that when "one interpretation of a statute would render it unconstitutional, the

which, if there are “two possible constructions of a statute, one of which would render the statute unconstitutional and the other of which would not, the court will adopt the interpretation that will not result in unconstitutionality.¹⁰⁷ The classical avoider does not avoid the constitutional (or, in REA cases, the substantive rights) decision, but decides that question and then interprets the statute, if possible, to avoid an unconstitutional construction.¹⁰⁸

The *Palmer* Court employed an analogous avoidance methodology. The district court had allocated to the defendant the burden of proving contributory negligence, although the defendant contended state law would have burdened the plaintiff.¹⁰⁹ The Plaintiff defended the district court’s decision in the Supreme Court by arguing that Rule 8(c) made contributory negligence an affirmative defense in the federal courts.¹¹⁰ Rule 8(c) could have been so interpreted. It provided that “[i]n responding to a pleading a party must affirmatively state any avoidance or affirmative defense, including . . . contributory negligence. . . .”¹¹¹ With a scant, one-sentence explanation, the Court rejected Plaintiff’s argument and construed Rule 8(c) to avoid conflict with state law, holding that Rule 8(c) did not allocate the burden of proving contributory negligence, but dealt only with the manner of pleading.¹¹² By construing Rule 8(c) as a rule of pleading only, the Court did avoid the conflict between Federal Rule and state law. Having lost touch with the context of the *Palmer* case, current courts will use the case to support construing Federal Rules narrowly to protect important state interests.¹¹³ In fact, narrow construction of the Federal Rule in *Palmer* prevented Rule 8(c) from yielding to the state law’s conflicting apportionment of burden of proof.

Two important cases, *Guaranty Trust Co. v. York*,¹¹⁴ and *Ragan*,¹¹⁵ fundamentally altered the *Erie* landscape before the Court returned to avoidance techniques in

court should adopt any plausible interpretation that would avoid the question.” *See, e.g.*, Barrett, *supra* note 56, at 138-39 (citing John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997) and referring to the canon as the “unconstitutionality” canon to distinguish it from the “doubts” version of avoidance); Vermeule, *supra* note 56, at 1949 (referring to the narrower avoidance principle as “classical” avoidance and noting that the difference between “classical” and “modern” avoidance is “that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional” (emphasis in original)); Young, *supra* note 56, at 1578-79 (using the terms “classical” and “modern”).

¹⁰⁷ Vermeule, *supra* note 56, at 1959 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, concurring) (emphasis added in article); *see also* Barrett, *supra* note 56, at 138-39; Young, *supra* note 56, at 1578-79.

¹⁰⁸ The “classical” avoidance doctrine has largely been supplanted by “modern” or “serious doubts” avoidance that permits a court to seek a less preferable construction of a statute if the most natural construction *might* be unconstitutional. Vermeule, *supra* note 56, at 1949.

¹⁰⁹ *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943).

¹¹⁰ *Id.* at 117.

¹¹¹ FED. R. CIV. P. 8(c) (1938).

¹¹² *Palmer*, 318 U.S. at 117.

¹¹³ *See supra* note 105.

¹¹⁴ 326 U.S. 99 (1945).

Rule interpretation. These cases would also stall any significant development of avoidance in pre-*Hanna* cases by rendering the avoidance decision of formal import only.

Given the difficulty of dividing substance and procedure, the Supreme Court, in *Guaranty Trust*, embraced avoidance.¹¹⁶ It adopted a functional approach, ultimately referred to as the “outcome-determinative” approach, that would serve the “policy” of *Erie*¹¹⁷ and would make unnecessary determination of the substantive-procedural divide. Emphasizing that the policy of the *Erie* opinion “touche[d] vitally the proper distribution of judicial power between State and federal courts,”¹¹⁸ the *Guaranty Trust* Court concluded that the intent of the *Erie* decision was to ensure uniformity of outcome in federal and state courts:

In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.¹¹⁹

The *Guaranty Trust* Court, thus, made unnecessary *Erie*’s inquiries into whether there was federal power to make law in a particular case and, if so, whether that power was appropriately exercised by Congress or the Supreme Court in the case at issue. It replaced those questions with an inquiry (under the “policy” of *Erie*) into whether use of federal law would be outcome determinative in the particular litigation. Although the language of the *Guaranty Trust* decision would have permitted a more nuanced choice of federal or state law,¹²⁰ the Court applied its outcome-determinative approach inflexibly, concluding regularly that federal courts sitting in diversity were to be considered as “only another court of the State”¹²¹ and,

¹¹⁵ *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

¹¹⁶ *Guaranty Trust*, 326 U.S. at 107-10.

¹¹⁷ *Id.* at 109-10.

¹¹⁸ *Id.* at 109.

¹¹⁹ *Id.*

¹²⁰ *See, e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 466-68 (1965).

¹²¹ *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). *See also* *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949) (quoting *Angel v. Bullington*, 330 U.S. 183, 187 (1947)); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 532 (1949) (“If recovery could not be had in the state court, it should be denied in the federal court”); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555 (1949) (noting that *Erie* and its progeny established a “far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business”) (citation omitted); *Angel v. Bullington*, 330 U.S. 183, 187 (1947). The Supreme Court, in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 202-03 (1956), articulated the conformity requirement as follows:

The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a

thus, that differing federal procedure must yield to state law. The Court's invocation of the "outcome-determinative" approach to bridging the substance-procedure divide in *Erie* cases focused on the desire to ensure vertical uniformity – a uniform outcome for state-law claims, whether tried in the state or federal courts – and caused many to doubt the validity, at least in diversity actions, of the newly created Federal Rules that had been intended to establish uniform, simple, and predictable procedural Rules for the federal courts.¹²²

Guaranty Trust, of course, did not deal with a potential conflict between Federal Rule and state law. In this pre-*Hanna* era,¹²³ however, rigorous application of *Guaranty Trust's* outcome-determinative principle threatened the validity of the nascent Federal Rules.¹²⁴ As Professor Arthur Hill wrote, "Inevitably the question arose whether the provisions of the Federal Rules of Civil Procedure could stand if they tended to promote an outcome at variance from the outcome in a state court."¹²⁵ The Court's 1949 decision in *Ragan v. Merchants Transfer & Warehouse Co.*,¹²⁶ cemented the grounds for concern, and, in fact, put at risk the integrity of the Rules.¹²⁷

In *Ragan*, the Supreme Court seemed to subordinate Fed. R. Civ. P. 3 to state law, by applying outcome determinative principles.¹²⁸ At issue was a potential conflict

state-created right in a diversity case is, as we have said in *Guaranty Trust Co. of New York v. York*, . . . in substance 'only another court of the State.'

¹²² For discussion of the purposes of the original Federal Rules, see Burbank, *supra* note 23, at 1024-25; Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 690 & n.67. For an overview of the commentary despairing that Federal Rules could be effective in diversity after *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) and the companion cases of *Cohen v. Beneficial Industrial Loan Co.*, 530 U.S. 541 (1949) and *Woods v. Interstate Realty, Co.*, 337 U.S. 535 (1949), see Gavit, *supra* note 29, at 1, 3, 24-26; Hill, *supra* note 29, at 432-34 (cataloguing uncertainty regarding the validity of federal statutes and at least the following Federal Rules in instances of potentially inconsistent state law, following the Court's decision in *Ragan*: Federal Rules 15(c) (relation back of amended pleadings), Rule 6 (time computation principles), 25(a) (substitution of parties), Rule 41(b) (dismissal of action for nonprosecution), Rule 13 (counterclaims and crossclaims), Rule 18(b) (joinder of principal claim with contingent claim), Rule 2 (regarding joinder of legal and equitable claims), Rule 23(a)(3) ("spurious" class actions), Rule 42(a) (regarding admissibility of evidence), Rule 35 (mental and physical exams), Rules 38 and 39 (regarding denying a jury trial when a conflicting state law would permit jury trial), Rule 17(b) (capacity of certain types of persons to sue and be sued), Rule 23(b) (actions by shareholders), Rule 4(d) (substituted service)); Merrigan, *supra* note 29, at 711-12, 717-25; Keeffe et al., *supra* note 29, at 506-09, 513, 525; Clark, *supra* note 29, at 182-84.

¹²³ *Hanna* solidified the difference between the Court's rulemaking, which is based on congressionally delegated authority, and Court common law or practice, and it released "valid" Federal Rules, i.e., Rules that complied with the Constitution and the REA's substantive rights provision, from the gravitational pull of the RDA analysis, which applied to cases subject to the "relatively unguided *Erie* choice." *Hanna v. Plumer*, 380 U.S. 464, 471 (1965); see also Ely, *supra* note 15, at 697-700, 718-22.

¹²⁴ See *supra* note 122.

¹²⁵ Hill, *supra*, note 29, at 429.

¹²⁶ 337 U.S. 530 (1949).

¹²⁷ See *supra* note 122.

¹²⁸ *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 532-34 (1949).

between Rule 3, which provided that “[a] civil action is commenced by filing a complaint with the court,”¹²⁹ and state law, which provided that “[a]n action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him. . . .”¹³⁰ The plaintiff had filed a diversity action in federal court on September 4, 1945, regarding an accident that occurred on October 1, 1943 – safely within the two-year statute of limitations prescribed by the governing Kansas law.¹³¹ Service on the defendant, however, was not perfected until December 28, 1945, which was outside the two-year limitations period and which triggered the potential conflict between Federal Rule and state law. The *Ragan* Court concluded, in line with the uniformity policy of *Erie*, as articulated in *Guaranty Trust*, that, “[i]f recovery could not be had in the state court, it should be denied in the federal court.”¹³² Emphasizing that the state claim at issue “accrues and comes to an end when local law so declares,” the Court concluded that the claim could not have “longer life in the federal court than it would have had in the state court without adding something to the cause of action.”¹³³

In so holding, the Court gave short shrift to arguments of the plaintiff in *Ragan*¹³⁴ and Justice Rutledge, in a dissent that he filed with respect to each of the three *Erie* cases decided on the same day as *Ragan*.¹³⁵ Each argued that, when Federal Rules were at issue, the *Erie* line of cases did not control.¹³⁶ Justice Rutledge took the majority to task for applying to Federal Rules *Guaranty Trust*’s “gloss on the *Erie* rule” that had positioned the federal court in diversity as “merely another court of the state in which it sits,” and, which, in Justice Rutledge’s view, had “seriously impaired Congress’s power” to control procedure in diversity litigation.¹³⁷ He concluded that, although it is difficult to distinguish between substance and procedure, the Court must do so either mechanically by “reference to whether the state courts’ doors are open or closed” or by reconciling the rule of *Erie* with Congress’s conceded authority over procedure in the federal courts.¹³⁸ Without

¹²⁹ *Id.* at 531 & n.1.

¹³⁰ *Id.* at 531 & n.4.

¹³¹ *Id.* at 531.

¹³² *Id.* at 532.

¹³³ *Id.* at 533-34.

¹³⁴ Brief of Petitioner, 1949 WL 50616, at *7-*24, *35-*40, *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (No. 522) (arguing that *Sibbach v. Wilson*, 312 U.S. 1 (1940) and *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), provided the correct analysis for determining the validity of Rules promulgated under the REA and that it would be improper to extend the *Guaranty Trust* analysis to Federal Rules).

¹³⁵ 337 U.S. 541, 558-59 (1949) (Rutledge, J., dissenting) (Emphasizing that the three cases – *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Woods v. Interstate Realty Co.*, 530 U.S. 535 (1949), and *Cohen v. Beneficial Industrial Loan Corp.*, 530 U.S. 541 (1949) -- indicate the extent to which the Court is inappropriately submitting control of diversity jurisdiction to the states, based on a “gloss” on the language of *Erie v. Tompkins*, rather than to Congress, which “has the power to govern the procedure of the federal courts in diversity”).

¹³⁶ See *supra* notes 134 and 135.

¹³⁷ *Cohen*, 337 U.S. at 558-59 (Rutledge, J., dissenting).

¹³⁸ *Id.* at 559.

acknowledging these arguments, the *Ragan* Court held that state law controlled under *Erie*'s uniformity policy.

Although commentators' reports of the death of Rule 3 turned out to be premature,¹³⁹ it was not until much later – 1965 -- that the *Hanna* Court (1) would reinterpret the *Ragan* case as one in which the “scope of the Federal Rule was not as broad as the losing party urged, and therefore, there [was] no Federal Rule which covered the point in dispute;”¹⁴⁰ and (2) would resurrect the notion – ignored by the Supreme Court in *Ragan*, but not in the federal circuit courts¹⁴¹ -- that Federal Rules and statutes were subject to different standards of validity than judge-made law.¹⁴² In the interim, the sense that broad application of the outcome-determinative principle would override conflicting Federal Rules (and even federal statutes), combined with the growing arguments that outcome determination, as construed by the Court, elevated the states above Congress in matters of federal procedure,¹⁴³ to reduce the importance of an avoidance principle.

In *Cohen v. Beneficial Industrial Loan Corp.*,¹⁴⁴ a case decided on the same day as *Ragan*, the Court used an avoidance canon that seemed to straddle the divide between “classical” and “modern” or “serious doubts” avoidance.¹⁴⁵ In so-called “serious doubts” avoidance, the court will, if possible, avoid the most natural construction of a provision in favor of a less plausible construction, if the most natural interpretation presents a serious question of potential invalidity. A court using a serious doubts analysis in the REA context would construe a rule narrowly to avoid invalidity if the most natural construction of the Rule raised serious doubts about whether the Rule would abridge, enlarge, or modify substantive rights.

A majority of the *Cohen* Court avoided finding a direct conflict between (1) Fed. R. Civ. P. 23, which included prerequisites for stockholder derivative actions; and (2) a New Jersey statute, which required a plaintiff in a derivative action who had specified minimal holdings in the defendant corporation to pay attorney fees and expenses of the defendant if the suit were unsuccessful and also to post security for payment of the fees and expenses.¹⁴⁶ The Court concluded that, because there was no conflict in the prerequisites of Rule 23 and the New Jersey statute, the provisions

¹³⁹ See, e.g., Hill, *supra* note 29, at 432 (stating that “Rule 3 (commencement of action) was struck down by the Supreme Court itself in the *Ragan* case”).

¹⁴⁰ *Hanna v. Plumer*, 380 U.S. 460, 470 (1965).

¹⁴¹ See, e.g., *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963); *D'Onofrio Constr. Co. v. Recon Co.*, 255 F.2d 904, 909-10 (1st Cir. 1958); *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940).

¹⁴² *Hanna*, 380 U.S. at 463-65, 469-74.

¹⁴³ See, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 558-59 (1949) (Rutledge, J., dissenting). See also Gavit, *supra* note 29, at 26; Hill, *supra* note 29, at 427-34, 577-86 (recognizing that Court opinions had endangered the Federal Rules and, indeed federal statutes, but arguing that there is federal power to create uniform rules of procedure).

¹⁴⁴ 337 U.S. 541 (1949).

¹⁴⁵ See *supra* notes 106 to 108.

¹⁴⁶ *Cohen*, 337 U.S. at 543-44, 555-57.

of both the Federal Rule and state law could apply consistently with the policy of *Guaranty Trust*.¹⁴⁷ The *Cohen* Court parsed the statute into two categories – the clearly substantive and the possibly procedural. It concluded that the requirement that plaintiff-stockholders with minimal corporate holdings pay fees and expenses of the defendant corporation if the defendant prevailed created a new liability and was clearly substantive.¹⁴⁸ Respecting the requirement to post security for payment of the fees and expenses, however, the Court noted that procedural rules “do not always exhaust their effect by regulating procedure.”¹⁴⁹ Emphasizing that the security requirement made meaningful the substantive liability for fees and costs, the Court concluded that it “[did] not think” the state requirement could be disregarded by a federal court as “a mere procedural device.”¹⁵⁰ The Court then compared the procedural prerequisites to suit set forth in Rule 23 and those in the New Jersey statute. Finding no conflict in the provisions of Rule and statute and that all could be observed, the Court saw “no reason why the policy stated in *Guaranty Trust* . . . should not apply.”¹⁵¹ Again, pre-*Hanna* avoidance protected the Federal Rule (but not very much), rather than state law.

The Supreme Court did not otherwise overtly reference an avoidance principle in pre-*Hanna* REA cases. That is unsurprising. As noted, avoidance, in the pre-*Hanna* period, meant only that the Federal Rules would not be invalidated as a formal matter. As a pragmatic matter, the Rules would be subordinated to state law in cases of a direct conflict, in which outcome determination, as applied by the courts, meant that state law would prevail, and the Rules also yielded to state law (but were not formally invalidated) in instances in which the Court avoided a direct conflict, since, absent a conflict with a controlling Federal Rule, the state law would apply or both the Federal and state law would control.¹⁵² In other pre-*Hanna*, REA cases, the Federal Rule at issue also seemed to succumb to Court implementation of an outcome-determinative analysis that appeared to override the Rules based on a determination that the federal court must sit as “another court of the state.”¹⁵³ Indeed, some commentators, emphasizing the ineffectiveness of Federal Rules in diversity cases as opposed to federal question cases, began to suggest that the Court make it official and promulgate a Rule indicating that Federal Rules applied in federal question cases only.¹⁵⁴

¹⁴⁷ *Id.* at 556-57.

¹⁴⁸ *Id.* at 555-56.

¹⁴⁹ *Id.* at 556.

¹⁵⁰ *Id.* at 556. It is not clear whether the Court decided the issue of invalidity, as in “classical” or “narrow” avoidance, or whether its statement that it “[did] not think” that the statute “[could] be disregarded as . . . “mere procedure” is in fact, an abdication of a final decision and a use of serious doubts avoidance.

¹⁵¹ *Id.*

¹⁵² *Cohen*, 337 U.S. at 556-57 (observing that, where there was no conflict between the Federal Rule and state law, there was no reason why the policy of *Guaranty Trust*, and hence, both federal and state law, should not apply).

¹⁵³ See *supra* note 121.

¹⁵⁴ See, e.g., Merrigan, *supra* note 29, at 727; Clark, *supra* note 29, at 183-84.

In one final pre-*Hanna* case, *Bernhardt v. Polygraphic Co. of America*,¹⁵⁵ the Court used an interpretive canon of avoidance. The *Bernhardt* Court examined a federal statute (rather than a Federal Rule) that was in potential conflict with state law. *Bernhardt*, thus, is inapposite in the REA context because the Court did not construe a Rule narrowly to avoid deciding the substantive-procedural limitation of the REA. (The substantive rights limitation, of course, is not applicable to federal statutes¹⁵⁶). Instead, the Court used “serious doubts” avoidance to construe the federal statute at issue narrowly to avoid deciding a serious question of constitutional law. State law, in *Bernhardt*, permitted revocation of an agreement to arbitrate at any time before an arbitral award; the Federal Arbitration Act (FAA), by contrast, rendered arbitration agreements covered by the FAA “valid, irrevocable, and enforceable” and permitted stay of a trial court action pending arbitration.¹⁵⁷ *Bernhardt*’s use of a “serious doubts” avoidance canon was significant, though not to REA avoidance. The serious question of constitutional law that the *Bernhardt* Court avoided was whether Congress had the power to require arbitration in diversity cases in the face of contrary state law. Avoidance, thus, permitted delay – at least until the *Byrd* decision two years later¹⁵⁸ -- of the inevitable decision regarding whether the ultimate power over federal procedure in diversity cases lay with Congress or the states.

The battle lines were clearly drawn, however, and avoidance in *Bernhardt* would only buy time regarding the serious constitutional inquiry: whether states (under the rationale of *Erie* and *Guaranty Trust*) or Congress (and, thus, also its delegate, the Supreme Court) under the authority of Articles I and III and the Supremacy Clause would prevail in event of an unavoidable conflict between state law and federal statute or Rule. In the interim, the *Bernhardt* decision to avoid the clash of state law and federal statute seemed to solidify the strength of state courts over federal procedure and to indicate that even conflicting federal statutes would fall to state law under the outcome-determinative approach.¹⁵⁹ In fact, Judge Charles Clark reported that commentators, concluding that Federal Rules that differed from state law could not prevail in diversity, were recommending (1) that the principle for validity of any federal procedure (whether based on statute, Rule, or judge-made law) be based on whether differences between state and federal procedure would lead to “forum shopping”; (2) that the Federal Rules be amended to provide that they only applied in federal question cases;¹⁶⁰ or (3) that courts “merely hope” for a

¹⁵⁵ 350 U.S. 198 (1956).

¹⁵⁶ *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). See also *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 470 (7th Cir. 1984); accord *Genetin, Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 748.

¹⁵⁷ *Id.* at 199-201.

¹⁵⁸ *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

¹⁵⁹ See, e.g., *Hill*, *supra* note 29, at 431-32, 437.

¹⁶⁰ See, e.g., *Merrigan*, *supra* note 29, at 727 (recommending that the Federal Rules be repealed as to diversity cases (but not federal question cases) and that federal court conformity to state procedure be reinstated by Court Rule or by statute); *Gavit*, *supra* note 29, at 26 (stating that the Federal Rules should be amended to state the Court’s intent or to state that in “all diversity cases the Rules are not applicable” or

reversal in policy from the Supreme Court in “an inevitable reaction from the present low point.”¹⁶¹

C. *The Avoidance Canon in Post-Hanna Cases*

Section II.C focuses on the Supreme Court’s use of avoidance techniques in post-*Hanna* cases, broadening the exploration beyond use of avoidance in REA cases under *Erie* to include avoidance in the context of apparent clashes of congressional statutes and Federal Rules and to include avoidance in general construction of Federal Rules. Section III.C.1 resumes the narrative of the evolution of the *Erie* doctrine and its impact on an avoidance canon in the REA analysis in *Erie* cases. Specifically, Section II.C.1 discusses the Supreme Court’s limiting of *Guaranty Trust’s* outcome-determinative approach in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* and *Hanna v. Plumer* and the consequent increase in importance of the scope of a Federal Rule in apparent conflict with state law.

Section II.C.2.a discusses the post-*Hanna*, *Erie* REA cases in which the Court complied with the substantive-procedural divide by construing Rules narrowly and not to conflict with state law, thus making unnecessary a validity analysis under the REA: *Walker v. Armco Steel Corp.*, *Gasperini v. Center for Humanities, Inc.*, and *Semtek International, Inc. v. Lockheed Martin Corp.* This discussion reveals that the post-*Hanna* cases lack a consistent approach – other than that avoidance is based on federalism concerns.¹⁶² It also demonstrates that avoidance based on federalism concerns leads, like the *Guaranty Trust* outcome-determinative principle, to differing definitions of Federal Rules in diversity and federal question cases. Section II.C.2.b concludes the historical retrospective with an examination of the Court’s use of avoidance in other REA contexts, noting Congress’s move to reclaim a role in federal procedural rulemaking in the 1970s and 1980s, which, in turn, reprised the importance of the substantive rights limitation in potential conflicts between congressional statutes and Federal Rules and in construction of Federal Rules. In these contexts, the Court has, in opting for avoidance, relied much more heavily on the text of the Rule, its historical context, and the Advisory Committee Notes than the Court has done in its use of avoidance in *Erie* cases. The Court also generally used “serious doubts” avoidance to construe Rules narrowly to avoid a direct validity analysis.

1. *From Byrd to Hanna – the Elevation of the Importance of Scope*

Two years after its decision in *Bernhardt* delaying confrontation regarding congressional and state power over procedure in federal courts, the Supreme Court

the Court should state that “the Supreme Court which promulgated the Federal Rules . . . , having power to do so, decided the matter in controversy”).

¹⁶¹ See, e.g., Clark, *supra* note 29, at 183-84.

¹⁶² See *infra* notes 186-220, and accompanying text.

decided *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,¹⁶³ which began the process of making federal procedure relevant again in diversity cases. Rejecting the notion that outcome determination was the only consideration when federal and state procedural laws clashed, *Byrd* introduced a form of interest balancing that permitted consideration of “affirmative countervailing” federal interests and state interests as well as the likelihood that applying federal law would be outcome determinative.¹⁶⁴ No longer would federal courts sitting in diversity be viewed as “just another court of the state,” whose procedure must yield to conflicting state procedure or be construed narrowly not to apply. To the contrary, sometimes, in instances of conflict, federal procedural law would control. In this legal landscape, a narrow construction of the scope of the Federal Rule at issue could be consequential, and, after *Hanna*, would be dispositive.

The Supreme Court’s decision seven years later, in *Hanna v. Plumer*,¹⁶⁵ completed the Supreme Court’s “inevitable reaction” to rigid application of the outcome-determinative principle that Judge Charles Clark had hoped for.¹⁶⁶ *Hanna* limited even further the application of *Erie*’s uniformity policy, as articulated in *Guaranty Trust*;¹⁶⁷ acknowledged congressional superiority in federal procedural law enacted in compliance with Congress’s broad authority over federal courts under Articles I and III of the Constitution as supplemented by the Necessary and Proper Clause;¹⁶⁸ and vastly empowered Federal Rules promulgated by the Supreme Court when in conflict with state law. After *Hanna*, Federal Rules that conflicted with state law would be valid and would control if they neither violated the Constitution, nor exceeded the statutory limitations of the Rules Enabling Act.¹⁶⁹ A Federal Rule passed constitutional muster if the Rule, “though falling within the uncertain area between substance and procedure, [was] rationally capable of classification as either.”¹⁷⁰ It complied with the substantive rights limitation of the Rules Enabling Act if it “really regulate[d] procedure -- the judicial process for enforcing rights and duties recognized by substantive law, and for justly administering remedy and redress for disregard or infraction of them.”¹⁷¹ As Justice Scalia emphasized in his plurality opinion in *Shady Grove*, under this standard, the Supreme Court has rejected every challenge asserting that a Federal Rule failed to comply with the substantive rights limitation.¹⁷² It is not clear, however, if this is a virtue or a vestige of the Supreme Court’s willingness to

¹⁶³ 356 U.S. 525 (1958)

¹⁶⁴ *Byrd*, 356 U.S. at 535-50.

¹⁶⁵ 380 U.S. 460 (1965)

¹⁶⁶ See *supra* note 161, and accompanying text.

¹⁶⁷ 380 U.S. at 467-68.

¹⁶⁸ *Id.* at 471-72.

¹⁶⁹ *Id.* at 463-64, 471.

¹⁷⁰ *Id.* at 472; see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27-28, 31-32 (1988); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 & n.3 (1987).

¹⁷¹ *Hanna*, 380 U.S. at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

¹⁷² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442-43 (2010) (opinion of the Court).

construe Rules narrowly to safeguard “important state interests.”¹⁷³ Indeed, Justice Stevens and a growing number of commentators have concluded that the Court must, on occasion, be willing to find a conflict between Federal Rule and state law, to reach the validity analysis, and, on occasion, to invalidate a Rule.¹⁷⁴ What is certainly clear is that, after *Hanna*, the scope of the Federal Rule became critical.

Hanna also taught the first lessons of instrumental interpretation of the scope of Federal Rules in potential conflict with state law, by providing only a cursory analysis of the scope issue regarding Fed. R. Civ. P. 4(d)(1); by referencing, as governed by avoidance principles, prior cases in which the Federal Rule had seemed to fall to state law under an outcome-determinative analysis; and by suggesting that avoidance would be governed by federalism concerns. In determining the scope of Fed. R. Civ. P. 4(d)(1), which was at issue in *Hanna*, the Court did not use a canon of narrow construction or avoidance, but simply stated in a conclusory manner that the “clash is unavoidable,”¹⁷⁵ and it also concluded that Rule 4(d)(1) complied with both the constitutional and Enabling Act requirements, noting that Rules adopted through the Enabling Act process carried a presumption of validity.¹⁷⁶ Rule 4(d)(1) permitted service of process by leaving a copy of the summons and complaint at a defendant’s residence with “a person of suitable age and discretion then residing therein . . . ,” while the Massachusetts statute at issue provided for service to be made “by delivery in hand upon such executor or administrator” before the expiration of the statutorily specified one-year period.¹⁷⁷ In determining that Rule 4(d)(1) was valid, however, the Court ignored a potential substantive rights issue similar to that in *Ragan* – whether the method of substitute service under the Rule 4(d)(1) interfered impermissibly with the state’s choice to limit an executor’s exposure to liability through the notice provision.¹⁷⁸

Second, in its harmonization of prior decisions in which Federal Rules had been in potential conflict with state law, the *Hanna* Court hastened to assure that no Federal Rule had ever been invalidated by the outcome-determination principle of

¹⁷³ *Id.* at 1448 & n.10 (Ginsburg, J., dissenting).

¹⁷⁴ *Id.* at 1451-52, 1457 (Stevens, J., concurring in part and concurring in judgment); *see also* Doernberg, *supra* note 2, at ___; Burbank & Wolff, *supra* note **Error! Bookmark not defined.**58, at 51; Dudley & Rutherglen, *supra* note 45, at 743.

¹⁷⁵ *Hanna*, 380 U.S. at 470.

¹⁷⁶ *Id.* at 462-63, 471-74 & n.1. The *Hanna* Court discussed the standards for a Rule’s validity under the Constitution and the substantive rights limitation of the REA, *id.* at 463-65, 471-74, and it also prescribed a presumption of Rule validity under the REA, indicating that “[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.” *Id.* at 471 (citations omitted).

¹⁷⁷ *Id.* at 461-62.

¹⁷⁸ Of course, a state’s choice to use procedure to enable a substantive purpose does not mean that a conflicting Federal Rule would necessarily impact impermissibly the substantive purpose. *See, e.g.*, *McCoid*, *supra* note 39, at 913-14.

the RDA analysis.¹⁷⁹ The Court instructed, instead, that in each case of apparent Federal Rule-state law conflict in which state law had prevailed, the Court had determined that the scope of the Federal Rule was not broad enough to cover the issue.¹⁸⁰ In support of the position, the *Hanna* Court appropriately discussed *Palmer v. Hoffman*,¹⁸¹ in which the Court construed Rule 8(c) narrowly and avoided Rule nullification in the context of the Court's additional conclusion that burden of proof was substantive, and appropriately referenced *Cohen v. Beneficial Industrial Loan Corp.*,¹⁸² in which the Court had narrowly interpreted the scope of the Rule 23(b) (now, Rule 23.1) and, thus, avoided the state-law's invalidation of the Rule (although the court concluded that *both* state law and Federal Rule provisions would govern under principles of *Guaranty Trust*).

The *Hanna* Court's additional reference to *Ragan v. Merchants Transfer & Warehouse Co.*, as a case decided on avoidance principles,¹⁸³ however, seemed, at best, strained and, at worst, disingenuous, because the case had previously been widely construed as requiring Rule 3 to yield under outcome-determinative principles.¹⁸⁴ With the *Hanna* Court's new take on the case as one decided under avoidance principles, it was possible to read *Ragan* as a case in which the Court elided an initial determination that the Federal Rule and state law did not conflict and addressed the dispositive issue of whether federal or state law would control absent a Federal Rule on point. Imposing such a construction on competing federal and state provisions that both seemed to speak directly to when a case should be

¹⁷⁹ *Hanna*, 380 U.S. at 470.

¹⁸⁰ *Id.* The *Hanna* Court stated as follows:

The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

Id.

¹⁸¹ 318 U.S. 109 (1943). See also *supra* notes 99-113, and accompanying text.

¹⁸² 337 U.S. 541 (1949); see also *supra* notes 144- 151, and accompanying text.

¹⁸³ *Hanna*, 380 U.S. at 470 & n.12 (citing *Iovino v. Waterson*, 274 F.2d 41, 47-48 (2d Cir. 1959)). The Second Circuit in *Iovino*, indicated that Federal Rules controlled over state law when on point and neither beyond the scope of the Rules Enabling Act, nor outside Congress's authority over procedure under the Constitution. *Id.* at 45-46. The *Iovino* Court, moreover, also construed prior Supreme Court cases as dealing with Rules not on point, including *Angel v. Bullington*, 330 U.S. 183 (1947), *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), and *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). *Id.* at 47. Finding only the *Ragan* case troublesome, in its conclusion that, in prior cases, Federal Rules had not been in conflict with state law, the *Iovino* court determined that Rule 3 dealt only with commencement of an action and not with tolling of the statute of limitations. *Id.* at 47-48.

¹⁸⁴ See, e.g., Gavit, *supra* note 29, at 3, 6-8 (explaining the Supreme Court's decision, but indicating that it was incorrect); Hill, *supra* note 29, at 432; Merrigan, *supra* note 29, at 718-20; but see *Iovino*, 274 F.2d at 47-48.

deemed “commenced,” however, suggested either that *Hanna* had, in fact, overruled *Ragan*, or that courts could construe a Federal Rule against the plain import of its text to conclude that the scope of the Federal Rule was not broad enough to control the point in issue when the Rule might otherwise conflict with state law.¹⁸⁵ Despite *Hanna*’s seemingly mechanical standard that would uniformly protect Federal Rules, the Court has chosen the latter option in its post-*Hanna* avoidance jurisprudence, and construed Rules narrowly to avoid a conflict with state law, with the results that Federal Rules may be inappropriately subordinated to state law and that Federal Rules do not apply uniformly, but take on different meanings in diversity and federal question cases.

2. Avoidance in Post-Hanna Cases

a. Avoidance in Post-Hanna, Erie Cases

The Supreme Court’s post-*Hanna* REA cases under *Erie* have generally premised avoidance, when it is used, on the federalism goals of avoiding interference with important state interests or important state regulatory policies,¹⁸⁶ but otherwise reveal a continuing search for an appropriate avoidance principle. The cases exhibit little consistency in approach to avoidance, in defining when state interests or policies would qualify as important, and little consistent reliance on Rule text, Rule history, or Advisory Committee Notes to limit permissible “saving” constructions. This avoidance, based on an unbounded concept of important state interests and regulatory policies, has led to differing interpretations of Federal Rules in diversity and federal question cases.

In *Walker v. Armco Steel Corp.*,¹⁸⁷ the Supreme Court revisited the issue it addressed in *Ragan* – whether Rule 3 or state law controls the commencement of an action for purposes of tolling the state statute of limitations.¹⁸⁸ Rule 3 and state law seemed to be in “direct conflict,” and the appellate court so stated, although it felt “constrained” to follow *Ragan*.¹⁸⁹ The Supreme Court also construed Federal Rule 3

¹⁸⁵ The *Hanna* Court referenced the *Bernhardt* case with a “cf” citation. *Bernhardt*, in which the Court had construed a statute, the Federal Arbitration Act, narrowly to avoid serious constitutional doubts is doctrinally inapplicable to construing a Federal Rule narrowly to avoid a conflict abridging, enlarging, or modifying substantive rights, and the Court seems to acknowledge the distinction. The Court’s reference can be construed as support for use of avoidance principles to prevent contravention of the substantive rights limitation of the REA.

¹⁸⁶ *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 & n.7, 436-37 (1996); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-52 & nn.12-13 (1980).

¹⁸⁷ 446 U.S. 740 (1980).

¹⁸⁸ *Id.* at 742-43. As in *Ragan*, the state statute in *Walker* provided that an action would be deemed commenced when the defendant was served, and Rule 3 provided for commencement when the complaint was filed. *Id.* at 742-43 & nn.3-4. Also paralleling *Ragan*, the plaintiff in *Walker* filed the complaint within the state’s statute of limitations, but did not perfect service within that time period. *Id.*

¹⁸⁹ *Id.* at 744.

not to conflict with the state statute, relying, in part, on *stare decisis* and the need to reconsider both *Hanna* and *Ragan* if it were to conclude that Rule 3 and state statute conflicted.¹⁹⁰ The *Walker* Court additionally cautioned against a narrow construction of a Federal Rule to avert a conflict between Federal Rule and state law when contrary to a plain textual reading of the Rule at issue.¹⁹¹ Having so advised, however, the Court construed Rule 3 narrowly and against a plain reading of its text and, perhaps, history¹⁹² -- an impermissible result under the analogous canon to construe ambiguous statutes to avoid an unconstitutional construction.¹⁹³

Construing a Federal Rule against its text and doing so to protect state law, rather than separation of powers interests, creates potential for inconsistencies when the same Rule is construed in federal question cases. This potential for inconsistency played out in the nondiversity case, *West v. Conrail*,¹⁹⁴ in which the Supreme Court construed Rule 3 differently than in *Walker*, holding that a complaint is timely filed if it is filed, in accord with Rule 3, before the applicable statute of limitations runs.¹⁹⁵ The Court expressly declined to borrow the statute of limitations provisions for service of process¹⁹⁶ and expressly noted that its construction of Rule 3 meant that Rule 3 would be construed differently in diversity and federal question cases, a methodology that commentators have disparaged as effectively giving “two plain meanings” to a Rule 3.¹⁹⁷ More fundamentally, Court reliance on state interests to guide avoidance when state law is in potential conflict with Federal Rules but on “substantive rights” when federal law is in potential conflict with Federal Rules, creates two standards for Rule validity under the REA. When combined with a willingness to construe Rules contrary to their text and history, moreover, the door is open again to “*Erie* unlimited.”¹⁹⁸

¹⁹⁰ *Id.* at 745-49.

¹⁹¹ *Walker v. Armco Steel Corp.*, 446 U.S.740, 749-50 & n.9 (1980)

¹⁹² *Walker*, 446 U.S. at 750-51 & n.10. Given the Advisory Committee Note’s discussion of the potential Rule-validity issue in instances in which Rule 3 clashed with law (federal or state) that tolled the statute of limitations based on service, it may be that the rulemakers anticipated a conflict that would trigger the Rule validity analysis.

¹⁹³ *Cf.* Barrett, *supra* note 56, at __ (emphasizing that substantive canons “can never be applied to overcome the plain language of a statute . . . [but can be used] to reject the most natural interpretation of a statute in favor of a less plausible one that advances a particular value,” and noting that such an interpretation respects “the outer limits of statutory language”); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 459 (2005) (emphasizing that it is “an essential precondition” of use of the avoidance canon that the alternative interpretation be plausible); Young, *supra* note 56, 1576 (providing that “Congress’s intended construction governs where the intent is clear” and that the “avoidance canon . . . comes up only when there is doubt . . . about what the statute means in the first place”).

¹⁹⁴ 481 U.S. 35 (1987).

¹⁹⁵ *Id.* at 39.

¹⁹⁶ *Id.*

¹⁹⁷ *See* Dudley & Rutherglen, *supra* note 4544, at 743-44; Gavit, *supra* note 29, at 3; Struve, *supra* note 58, at 1150-51.

¹⁹⁸ Gavit, *supra* note 29, at 1.

In its next REA case, the Court did not rely on avoidance, but construed the Federal Rule broadly to cover the point in dispute. In *Burlington Northern Railroad Co. v. Woods*,¹⁹⁹ the Court considered an apparent conflict between Fed. R. App. P. 38 and an Alabama statute that imposed a mandatory ten percent affirmance penalty when a money judgment was affirmed on appeal without substantial modification.²⁰⁰ Rule 38, by contrast, provided that “[i]f the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.”²⁰¹ The *Burlington Northern* Court noted the purposes of Alabama’s mandatory affirmance penalty were to penalize frivolous appeals and to provide additional damages for having to undergo appeal,²⁰² and the purpose of Fed. R. Civ. P. 38 was to permit “damages . . . by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.”²⁰³ The Court, first, provided a broader definition of the scope of a Federal Rule, indicating that a Federal Rule conflicts with state law if it is “sufficiently broad’ to cause a ‘direct collision’ with the state law or, implicitly to ‘control the issue’ before the court, thereby leaving no room for the operation of state law.”²⁰⁴ Under this standard, the discretion permitted by Rule 38 conflicted unmistakably with the mandatory nature of the state statute, and the purposes of the federal and state provisions were “sufficiently coextensive” to establish that the Federal Rule “occupie[d] the [state] statute’s field of operation so as to preclude its application.”²⁰⁵ The *Burlington Northern* Court reached out to find a conflict where none was necessary since Rule 38 is, by its terms, limited to penalizing frivolous appeals and the Alabama statute at issue encompassed nonmeritorious as well as frivolous appeals. It also did so in the face of a substantive purpose of state law to augment available damages when a holder of a money judgment survived appeal with the judgment substantially intact. The case seemed to indicate that the Supreme Court was abandoning both avoidance as a principle of Rule interpretation and its prior protection of state interests.

Any such intent was short-lived, as the Court, in *Gasperini*, changed course yet again and endorsed a broad avoidance principle – an “accommodation” approach, in which the Court balanced and attempted to accommodate the interests underlying

¹⁹⁹ 480 U.S. 1 (1987).

²⁰⁰ The Alabama statute provided, in pertinent part, as follows:

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court. . . .

Burlington Northern, 480 U.S. at 3.

²⁰¹ *Id.* at 4.

²⁰² *Id.* at 4.

²⁰³ *Id.* (citing Advisory Committee’s Notes on Fed. R. Civ. App. Proc. 38, 28 U.S.C. App. P. 492).

²⁰⁴ *Id.* at 4-5 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 & n. 9 (1980) and *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)).

²⁰⁵ *Id.* at 7.

the potentially conflicting federal and state standards.²⁰⁶ The Court eschewed the *Hanna* methodology of beginning with an inquiry into the scope of the potentially conflicting Federal Rule. The *Gasperini* Court, instead, concluded that the New York statute at issue, CPLR § 5501(c),²⁰⁷ was both substantive and procedural,²⁰⁸ and it emphasized that the “dispositive question” was “[w]hether federal courts can give effect to the substantive thrust of CPLR § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases.”²⁰⁹ In pursuit of the goal of accommodation, the *Gasperini* Court weighed the substantive and, thus, dominant state interest and federal interests and determined that both interests could be served by providing trial court review, rather than appellate review of the verdict.²¹⁰ The standard *Hanna* scope analysis was relegated to a footnote, was addressed much later in the opinion, and consisted primarily of statements that Rule 59(a) was inapplicable and that the Court interprets Federal Rules to avoid conflict with important state regulatory policies.²¹¹ *Gasperini*’s avoidance by accommodation hinged much less on adopting a plausible, though narrowed, construction of the text of Fed. R. Civ. P. 59(a) than on the goal of limiting application of Rule 59(a), if important state and federal interests could both be served.

Finally, in *Semtek International Inc. v. Lockheed Martin Corp.*,²¹² a unanimous Supreme Court likewise employed a broad avoidance principle, but this time one that paralleled modern statutory construction to avoid serious constitutional doubts, and it based avoidance on, among other factors, both separation of powers and federalism concerns. The *Semtek* Court construed Fed. R. Civ. P. 41(b) narrowly (but against its accepted meaning) to avoid conflict with California preclusion law

²⁰⁶ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 & n.7, 436-37 & n.22 (1996).

²⁰⁷ New York CPLR § 5501(c) based appellate review of an itemized verdict on a standard of whether the verdict “deviates materially from what is reasonably compensable” – a less deferential review standard than would have been imposed in federal court under standards encompassed by Fed. R. Civ. P. 59(a). Rule 59(a) provided that “[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” *Id.* at 467-68 (Scalia, J., dissenting).

²⁰⁸ *Gasperini*, 518 U.S. at 429.

²⁰⁹ *Gasperini*, 518 U.S. at 426. *See also id.* at 436-38 (noting that “the principal state and federal interests can be accommodated” and that “New York’s dominant interest can be respected, without disrupting the federal system, once it is recognized that the district court is capable of performing the checking function, *i.e.*, that the court can apply the State’s “deviates materially” standard in line with New York case law . . .”).

²¹⁰ *Id.* at 428-39.

²¹¹ *Id.* at 437 & n.22. This avoidance by accommodation foreshadows Justice Ginsburg’s similar avoidance strategy in *Shady Grove*, in which she inquires, first, not about the scope of the Federal Rule, but whether a conflict is really necessary. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1460-61 (2010) (Ginsburg, J., dissenting). More specifically, Justice Ginsburg counsels avoidance when “immoderate interpretations of Federal Rules . . . would trench on state prerogatives without serving any countervailing federal interest.” *Id.* at 1461 (Ginsburg, J., dissenting).

²¹² 531 U.S. 497 (2001).

that would have permitted a case to proceed.²¹³ Rule 41(b) provided that certain dismissals would operate as an “adjudication upon the merits,”²¹⁴ and it, thus, seemed to define certain judgments that would be eligible for claim preclusive effect. To avoid an interpretation of Rule 41(b) that conflicted with California’s more lenient law and that was, thus, arguably in violation of the substantive rights limitation and “the federalism principle of *Erie*,” the Court contorted the meaning of “adjudication upon the merits,” determining that it meant only that a litigant could not refile the suit in the same district court.²¹⁵ Commentators have referred to this limiting construction as “transparently dubious,”²¹⁶ “remarkably strained,”²¹⁷ and “wildly implausible.”²¹⁸ The *Semtek* Court, thus, returned to a “serious doubts” avoidance analysis and appropriately based avoidance on the Rule’s potential violation of substantive rights (but also on federalism interests). The saving construction adopted by the *Semtek* Court, however, was contrary to the plain meaning of the text, the Rule’s history as revealed in Advisory Committee Notes and information, and prior construction of Rule 41(b),²¹⁹ an impermissible result under “serious doubts” avoidance principles.²²⁰

In summary, avoidance in the post-*Hanna*, *Erie* cases has emerged as a malleable surrogate for meaningful guidance regarding the substantive rights limitation. The avoidance cases demonstrate little consistency, save for a consistent focus on avoidance to protect state interests, which has permitted differing interpretations of Federal Rules in diversity and federal question cases. This focus has permitted too much emphasis on unbounded “state interests” and too little on whether the Federal Rule impermissibly impacts substantive rights. The Court has also repeatedly changed its methodology for avoidance, thus demonstrating continuing dissatisfaction with its avoidance analysis and also contrasting with the Court’s fairly consistent use of a serious doubts analysis, bounded by Rule text and history, in its admittedly few non-*Erie*, REA cases discussed in the next Section.

b. *Avoidance in Other REA Contexts*

²¹³ The issue in *Semtek* was “whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits.” *Semtek*, 531 U.S. at 499.

²¹⁴ *Id.* at 501. Rule 41(b) provided, in part, as follows: “any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.”

²¹⁵ *Id.* at 503-06.

²¹⁶ See, e.g., Burbank, *supra* note 44, at 1042-46 (referring to the Court’s construction of Rule 41(b) as “a transparently dubious interpretation” and concluding that the Rule’s history afford “no suggestion . . . that the rulemakers intended to cabin the effects [of Rule 41(b)] to the rendering court”).

²¹⁷ Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799, 815-16 (2004) (emphasizing that interpretation was “contrary . . . to the text of the Rule” and “had no support in the legislative history of the Rule”).

²¹⁸ Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 34 (2010).

²¹⁹ See, e.g., Burbank, *supra* note 44, at 1039-47; Struve, *supra* note 58, at 1150.

²²⁰ See *supra* note 193.

While the Court has struggled with the scope of Federal Rules in Federal Rule-state law conflicts, the Court has also examined the issue of Rule scope in other contexts, including congressional statute-Federal Rule conflicts and in general Rule interpretation.²²¹ Though the Court has taken fewer opportunities to address avoidance in non-*Erie*, REA cases,²²² it has used a serious doubts model of avoidance and relied more heavily on text and history of the Rule, as described in Advisory Committee Notes, as a limit on plausible Rule interpretation.

In resolving apparent congressional statute-Federal Rule conflicts, courts have sometimes treated Federal Rules as though they were statutes and as though the Court's prospective rulemaking authority was equivalent to Congress's lawmaking authority.²²³ This is contrary to the Court's attitude in *Erie* REA cases in which the Court has often subordinated Federal Rules to state law. This attitude may be attributed, in part, to the period of nearly forty years following the enactment of the REA, in which Congress generally declined to enact legislation that included procedural provisions or to enact amendments to the Federal Rules.²²⁴ Ultimately, following the 1973 skirmish over promulgation of the Federal Rules of Evidence,²²⁵ Congress, concerned that the proposed evidence rules overstepped the substantive rights limitation, became more active in the rulemaking process and more vigilant regarding potential rulemaking infractions of the substantive rights limitation. This meant that the substantive rights limitation would not be construed solely in *Erie* cases featuring Federal Rules and state law. The Supreme Court would also ignore the substantive rights limitation to the detriment of its rulemaking authority, as some commentators believed happened in the *Marek v. Chesny* case,²²⁶ which, in part, triggered Congress's unsuccessful attempt to subordinate Court rulemaking to congressional statutes by repealing a portion of the REA.²²⁷

The Court's 1984 decision in *Daily Income Fund, Inc. v. Fox*,²²⁸ appears to be the first congressional statute-Federal Rule case in which a justice counseled narrow construction of a Federal Rule to avoid potential violation of the substantive rights proviso (although the Court had been using an avoidance canon intermittently in *Erie* cases since 1943²²⁹). In *Daily Income Fund*, the Court considered whether Fed. R. Civ. P. 23.1 imposed a demand requirement before a

²²¹ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-48 (1999) *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 612-622 (1997).

²²² Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 705-06, 721-26 (discussing tendency of federal courts to use an analogy to the statutory canon of implied repeal in conflicts between congressional statutes and Federal Rules, which obscures issues of rulemaking authority under the REA).

²²³ See Genetin, *supra* note 10, at 704-05.

²²⁴ See *supra* notes 80-90, and accompanying text.

²²⁵ Genetin, *supra* note 10, at 694-96. See also Bone, *Process of Making Process*, *supra* note 20, at 902-03.

²²⁶ 473 U.S. 1 (1985).

²²⁷ See *infra* note 248.

²²⁸ 464 U.S. 523 (1984).

²²⁹ *Palmer v. Hoffman*, 318 U.S. 109 (1943).

shareholder could initiate a derivative action against a mutual fund under § 36(b) of the Investment Company Act of 1940 (ICA). The majority in *Daily Income Fund* concluded, without reaching the REA issue, that a § 36(b) action was not a “derivative action” because it could not be enforced by a mutual fund.²³⁰ In a concurring opinion, Justice Stevens used a serious doubts analysis to read Rule 23.1 narrowly and not to impose a demand requirement in any scenario, in order to avoid impacting substantive rights in violation of the REA.²³¹ Justice Stevens conceded that a shareholder demand requirement in a derivative suit enhances the role of managerial prerogatives and expertise, is designed to improve corporate governance, and is substantive.²³² He emphasized, however, that “the history of Rule 23.1 and its predecessors demonstrates” that the demand requirement was created by federal common law in *Hawes v. City of Oakland*,²³³ and not in Rule 23.1.²³⁴ Moreover, Rule 23.1, by its plain text, did not impose a demand requirement, but imposed only a pleading requirement – that the complaint allege with particularity the demand, if any, that the complainant had made on the corporation.²³⁵ The Rule, thus, enabled a court to ascertain from the pleadings whether an otherwise applicable demand requirement had been satisfied.²³⁶ In language similar to the canon to construe against serious constitutional doubts, Justice Stevens determined that there is a “substantial doubt whether [Rule 23.1] could create . . . [a demand] requirement consistently with the Rules Enabling Act,”²³⁷ and, thus, “[s]ince the rule does not clearly create such a substantive requirement by its express terms, it should not be lightly construed to do so and thereby alter substantive rights.”²³⁸ The Supreme Court returned to the issue of whether Rule 23.1 should be construed narrowly and not to impose a demand requirement in the 1991 case of *Kamen v. Kemper Financial Services, Inc.*,²³⁹ and adopted the narrow construction of Rule 23.1 suggested by Justice Stevens in *Daily Income Fund*.²⁴⁰

²³⁰ *Daily Income Fund*, 464 U.S. at 533-42.

²³¹ 464 U.S. at 542-44 & n.2 (Stevens, J., concurring in judgment).

²³² *Id.* at 544 n.2 (Stevens, J., concurring in judgment) (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) and *Ely*, *supra* note 15).

²³³ *Id.* at 543-44 & n.2 (Stevens, J., concurring in judgment).

²³⁴ *Id.* (Stevens, J., concurring in judgment).

²³⁵ *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 543 (1984) (Stevens, J., concurring in judgment). Fed. R. Civ. P. 23.1 provided at the time, in pertinent part as follows:

The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Id. at 543 n.1 (Stevens, J., concurring in judgment).

²³⁶ *Id.* at 543 (Stevens, J., concurring in judgment).

²³⁷ *Id.* (Stevens, J., concurring in judgment) (citing *Miss. Publ’g Co. v. Murphree*, 326 U.S. 438 (1946) and *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)).

²³⁸ *Id.* (Stevens, J., concurring in judgment) (citing *Hanna v. Plumer*, 380 U.S. 460, 470-71 (1965)).

²³⁹ 500 U.S. 90 (1991).

²⁴⁰ *Id.* at 96 (citing *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 543-44 & n.2 (1984) (Stevens, J., concurring in judgment), *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-57 (1949), and *Hanna v. Plumer* 380 U.S. 460, 477 (1965)).

The year after the Court decided *Daily Income Fund*, however, a majority of the Court, in *Marek v. Chesny*,²⁴¹ declined even to address the issue of whether a construction of Fed. R. Civ. P. 68 would violate the substantive rights limitation. At issue was whether a prevailing plaintiff's right to attorney fees under the Civil Rights Attorney Fees Act, in which attorneys fees are defined to be part of "costs,"²⁴² would be subject to shifting of "costs" under Rule 68,²⁴³ and, further, according to Justice Brennan in dissent, whether such a construction of Rule 68 would violate the substantive rights limitation of the REA. Disregarding the issue of impermissible impact on substantive rights, the *Marek* majority used a "plain meaning" construction of the intersection of Rule 68 and 42 U.S.C. § 1988, to conclude that the two provisions could be harmonized: Rule 68 provided for shifting of "costs" incurred after a plaintiff failed to accept a Rule 68 offer of judgment and later received less than the offer at trial, and § 1988 defined "costs" for purposes of the Civil Rights Attorney Fee Act to include "attorney fees."²⁴⁴ Hence, the Court held that, absent a clear expression of congressional intent to the contrary, attorney fees in civil rights actions were "costs" that could be forfeited under Rule 68.²⁴⁵ Justice Brennan forcefully asserted in dissent that the majority's interpretation of Rule 68 violated the substantive rights provision of the REA because it permitted a little known Federal Rule regarding "cost" shifting to override Congress's policy decision that prevailing plaintiffs in § 1983 civil rights actions should normally receive attorney fees.²⁴⁶ He advised as well a "serious doubts" type of avoidance, emphasizing that Federal Rules "have sometimes been interpreted or their domain of application narrowed to avoid abridging substantive rights," citing, *inter alia*, *Erie* REA cases, and concluding that the term "costs" in Rule 68 should have been narrowly construed to avoid an interpretation that would abridge the right to attorney fees under 42 U.S.C. § 1988.²⁴⁷

The *Marek* decision sparked congressional concern that the Court was exceeding its prospective lawmaking authority under the REA and, in part, precipitated the House of Representative's ultimately unsuccessful attempt to amend the REA so that conflicting Federal Rules would not supersede a congressional statute.²⁴⁸ *Marek* underscores, in the congressional statute-Federal Rule context, the real risk to Rule interpretation when

²⁴¹ 473 U.S. 1 (1985).

²⁴² 42 U.S.C. § 1988b provided as follows:

²⁴³ Fed. R. Civ. P. 68 provided as follows:

²⁴⁴ Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 706-10.

²⁴⁵ *Marek*, 473 U.S. at 9.

²⁴⁶ *Id.* at 28-38 (Brennan, J., dissenting); *see Chesny v. Marek*, 720 F.2d 474, 479 (7th Cir. 1984) (Posner, J.), *rev'd* 473 U.S. 1 (1985).

²⁴⁷ *Marek v. Chesny*, 473 U.S. 1, 32-38 (1985) (Brennan, J., dissenting).

²⁴⁸ *See generally* Burbank, *Hold the Corks*, *supra* note 10, at 1030-33; Moore, *supra* note 10, at 1044-48 Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2298-99 (1998). The attempt to amend the REA to eliminate the provision permitting Federal Rules to supersede federal statutes failed because the Senate refused to pass similar legislation, in part based on Chief Justice Rehnquist's pledge to tread carefully in promulgating Federal Rules that might violate the substantive rights limitation. Moore, *supra* note 10, at 1051-52.

courts rely on text unaided by the touchstone of history and purpose. Indeed, Professor Bone has characterized *Marek v. Chesny* as “perhaps the most notorious example of the hazards created by an oversimplified interpretive approach.”²⁴⁹ He also concluded that the presumption of validity that *Hanna* extends to Federal Rules²⁵⁰ should extend only to Rule interpretations that “further the Rule’s actual purpose in some sufficiently direct way” since the presumption is premised on the Rule’s having been vetted through the Enabling Act process.²⁵¹

Finally, the Court has also used a serious doubts avoidance methodology in a prominent class action case, *Ortiz v. Fibreboard Corp.*, and it also relied on Rule text and history in accepting a narrowed interpretation of Rule 23(b)(1)(B).²⁵² In *Ortiz v. Fibreboard*, the Supreme Court adopted a limiting construction of the limited fund class action available under Fed. R. Civ. P. 23(b)(1)(B) to avoid violating the REA’s requirement that Rules not abridge, enlarge, or modify substantive rights and to stay close to the historical basis for the limited class.²⁵³ The *Ortiz* Court rejected a proposed broad mandatory settlement class rationale, concluding that although the text of the Rule could accommodate the proposed “adventurous”²⁵⁴ application of the limited fund class, the Advisory Committee Notes showed that Rule 23(b)(1) was drafted in a “consciously retrospective” manner with an “intent to codify pre-Rule categories.”²⁵⁵ Further, the Court concluded that the substantive rights proviso of the REA also encouraged a cautious and narrower construction of the limited fund class action under Rule 23(b)(1)(B), noting that the broader construction of the Rule would set up a potential conflict between the pro rata distribution of available funds proposed in a Rule 23(b)(1)(B) class action and the right to complete recovery in personal injury actions under state law.²⁵⁶ The Court emphasized that, even if some tension between a Federal Rule and state law is

²⁴⁹ Bone, *To Encourage Settlement*, *supra* note 20, at 1615.

²⁵⁰ *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

²⁵¹ Bone, *To Encourage Settlement*, *supra* note 20, at 1616-17.

²⁵² 527 U.S. 815 (1999). *See also* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In *Amchem*, the Supreme Court also referenced avoidance in construing Rule 23. The *Amchem* Court emphasized the “extensive deliberative process” under the REA and that the process is “properly tuned” to Congress’s instruction that Federal Rules “shall not . . . abridge, enlarge or modify . . . any substantive right.” *Id.* at 620. Observing that class action practice had become “ever more adventuresome,” the Court reviewed the history of class action practice and concluded that federal courts “lack authority to substitute for Rule 23’s certification criteria” the fairness hearing requirements. *Id.* at 621-22.

²⁵³ *Ortiz*, 527 U.S. at 842-45. In *Ortiz*, attorneys proposing a settlement class action on a limited fund basis sought certification of a 23(b)(1)(B) class that did not meet the following traditional requirements of a limited fund class: the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, would demonstrate the inadequacy of the fund to pay all the claims, *id.* at 838-39, the whole of the inadequate fund would be devoted to the overwhelming claims, *id.* at 839, and the claimants identified by a common theory of recovery would be treated equitably among themselves. The proposed Rule 23(b)(1)(B) class fell short of these requirements because, *inter alia*, the “limited fund” was limited only by agreement of the defendants, the claimants did not include all potentially interested claimants, and the proposed payout would not deliver the proceeds on a pro rata basis. *Id.* at 839-41.

²⁵⁴ *Ortiz*, 527 U.S. at 845.

²⁵⁵ *Id.* at 842-43.

²⁵⁶ *Id.* at 845.

permissible, it is best to keep it within tolerable limits by narrowing the limited fund action available under Rule 23(b)(1)(B) to practice preceding adoption.²⁵⁷ The Court, thus, applied a “serious doubts” avoidance methodology to adopt a limiting construction of Rule 23(b)(1)(B), and it limited the Rule’s coverage to its “historical antecedents” and Advisory Committee expressions of understanding regarding the scope of limited fund class actions.²⁵⁸

Thus, in its few non-*Erie* cases, the Court used a serious doubts method of avoidance to stay within the substantive rights limitation of the REA, and it calibrated its limiting interpretations to plausible interpretations based on the Rule’s text, history, and purposes as discussed in relevant Advisory Committee Notes. In *Marek v. Chesny*, the Court failed to do so, but at the price of heightened congressional concern that the Court was overstepping the substantive rights boundary.²⁵⁹ In *Shady Grove*, the justices engage, once again, the important issues of appropriate methodology and guiding principles for avoidance in REA cases. They reference and adopt varying elements of the Court’s historical use of avoidance, to propose three different methods for avoidance that span a range of providing a very narrow to an extremely broad scope for avoidance in REA issues.

III. THE *SHADY GROVE* DEBATE REGARDING APPROPRIATE USE OF AVOIDANCE IN REA CASES

The fractured opinions in *Shady Grove* reveal wide-ranging differences on the Court regarding both the interpretation of the substantive rights proviso of the REA²⁶⁰ and the nature and extent of an appropriate avoidance canon of Rule interpretation in REA cases. Section II revealed that the Supreme Court has, since its first use of an avoidance canon in REA cases in *Palmer v. Hoffman*,²⁶¹ vacillated regarding whether it would even use an avoidance canon in interpreting compliance with the substantive rights limitation of the REA, concluding at times that avoidance was appropriate and at other times that it would construe Rules broadly and find a conflict when no conflict seemed necessary.²⁶² The Court has also used differing avoidance methodologies. The majority, concurring, and dissenting opinions in *Shady Grove* exhibit the Court’s continuing ambivalence regarding the appropriate model for avoidance, with Justice Scalia, for the majority, presenting a type of

²⁵⁷ *Id.* at 845.

²⁵⁸ 527 U.S. at 842-46.

²⁵⁹ See, e.g., Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 697-98, 709.

²⁶⁰ Justice Scalia, writing for a plurality in *Shady Grove* would adhere to a standard of whether a Rule “really regulates procedure.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (Scalia, J., plurality opinion). Justice Stevens, in concurrence in *Shady Grove*, suggests that the substantive rights limitation precludes Federal Rules that “would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” *Shady Grove*, 130 S. Ct. at 1452-53 & n.8-9 (Stevens, J., concurring in part and concurring in judgment).

²⁶¹ 318 U.S. 109 (1943).

²⁶² *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-7 (1987); *cf. Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26, 28-32 (1988) (apparent congressional statute-Federal Rule conflict at issue).

classical avoidance; Justice Stevens joining that portion of Justice Scalia’s opinion, but also proposing a version of a serious doubts canon of avoidance; and Justice Ginsburg preferring a theory of avoidance by accommodation.

The *Shady Grove* case involved a potential conflict between language in Fed. R. Civ. P. 23(b), which provides that “a class action may be maintained” if the requirements of Rule 23(a) and 23(b) are met, and New York Civil Practice Law and Rules (CPLR) § 901(b), which forbids maintenance of a class action for a statutorily prescribed penalty or minimum payment, unless the authorizing statute expressly permits a class action.²⁶³ In the underlying case, Shady Grove had provided medical care to a patient and had taken, as partial payment, an assignment of insurance benefits issued to the patient in New York by Allstate Insurance Co.²⁶⁴ When Shady Grove sought payment for the assigned benefits, Allstate paid but failed to do so within the 30-day period in which New York required either payment or denial of a claim, and Allstate later refused to pay the statutorily required interest.²⁶⁵ Shady Grove thereafter filed a class action suit against Allstate in the Eastern District of New York based on diversity jurisdiction to recover unpaid interest on its own claim and on claims of all others that Allstate had allegedly failed to pay timely.²⁶⁶ Allstate countered that CPLR § 901(b) prevented the proposed class action because it precludes a class action for a penalty or minimum recovery unless the statute creating the penalty or minimum statutory damages specifically permits a class action suit. Section 901(b) provides as follows:

Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or a minimum measure of recovery created or imposed by statute may not be maintained as a class action.²⁶⁷

Allstate also argued that, absent the ability to collect other claims for unpaid interest in a class action, Shady Grove, which incurred approximately \$500 in unpaid interest, could not meet the amount in controversy requirement for diversity jurisdiction.²⁶⁸ These facts set up the potential conflict between CPLR § 901(b) and Rule 23(b), which provides, in part, that “[a] class action may be maintained if Rule 23(a) is satisfied and if” the proposed class action is within one of the categories of permissible class actions set forth in Rule 23(b).²⁶⁹ The District Court held that Rule 23(b) and CPLR § 901(b) did not conflict and that CPLR § 901(b) precluded class

²⁶³ N.Y. Civ. Prac. Law Ann. § 901(b) (West 2006).

²⁶⁴ *Id.* at 1436.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1436-37.

²⁶⁷ N.Y. Civ. Prac. Law Ann. § 901(b).

²⁶⁸ *Shady Grove*, 130 S. Ct. at 1436-37.

²⁶⁹ FED. R. CIV. P. 23(b).

action treatment of the claim at issue.²⁷⁰ It, therefore, dismissed the action for lack of subject matter jurisdiction.²⁷¹ The Second Circuit affirmed.²⁷²

In a decision that featured fractured opinions and disparate reasoning, the Supreme Court reversed, with five justices concluding that Rule 23(b) and CPLR § 901(b) conflicted, that is, Rule 23(b) is broad enough to cover the issue in dispute.²⁷³ Five justices also concluded that Rule 23(b) is valid and, thus, preempts state law, but they differed on the rationale for validity. Justices Scalia wrote a plurality opinion that was joined by Justices Roberts, Thomas, and Sotomayor, which concluded that Rule 23(b) was valid because the standard for validity is whether the Rule “really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them,”²⁷⁴ and Rule 23(b) satisfied that standard. Justice Stevens concurred in the decision that Rule 23(b) was valid, but he would read the substantive rights limitation to preclude Federal Rules that “would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”²⁷⁵ Concluding that CPLR § 901(b) was procedural and not sufficiently intertwined with substantive purposes, Justice Stevens concluded that Rule 23 governed.²⁷⁶ Justice Ginsburg dissented. Writing for four dissenting justices, she determined that Rule 23(b) did not conflict with § 901(b) and would have applied an *Erie* analysis.²⁷⁷

In this Section, I examine the divergent methods for analyzing the scope of a Federal Rule in potential conflict with state law that are presented in the majority, concurring, and dissenting opinions in *Shady Grove*. I conclude that an avoidance principle is warranted in REA cases, and it should be based on analogy to construing statutes narrowly to avoid serious constitutional doubts, in a manner similar to the avoidance principles proffered by Justice Stevens in *Shady Grove*. Such an avoidance

²⁷⁰ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp.2d 467, 475 (E.D.N.Y. 2006).

²⁷¹ *Shady Grove*, 130 S. Ct. at 1437.

²⁷² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 143-45 (2d Cir. 2008).

²⁷³ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1431-42 (2010) (Scalia, J., opinion of the Court). Justice Scalia wrote this portion of the opinion – Sections I and II.A – on behalf of himself, and Justices Roberts, Stevens, Thomas, and Sotomayor. No other portions of the opinion commanded a majority.

²⁷⁴ *Id.* at 1442 (Scalia, J., plurality opinion). The plurality concluded that “[w]hat matters is what the rule itself regulates: If it governs only “the manner and the means” by which the litigants’ rights are “enforced,” it is valid; if it alters “the rules of decision by which [the] court will adjudicate [those] rights, it is not” (quoting *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)). The plurality concluded that Rule 23(b) met this standard. *Id.* at 1443-44 (Scalia, J., plurality opinion).

²⁷⁵ *Id.* at 1452-54 (Stevens, J., concurring in part and concurring in judgment). For Justice Stevens, the substantive rights limitation will preclude an application of a Federal Rule that abridges, enlarges, or modifies substantive rights. That will happen rarely, but if a state procedural law is sufficiently intertwined with a state right or remedy, a conflicting Federal Rule may be invalidated. *Id.* (Stevens, J., concurring in part and concurring in judgment).

²⁷⁶ *Id.* at 1456-60 (Stevens, J., concurring in part and concurring in judgment).

²⁷⁷ *Id.* at 1460-74 (Ginsburg, J., dissenting).

rule of interpretation, however, should be guided by whether a Rule would encroach on Congress's substantive lawmaking powers, rather than on whether a Rule might interfere with an unlimited concept of important state interests or regulatory policies.²⁷⁸ Further, in determining whether avoidance is permissible, the Court should, in line with its use of avoidance in other Enabling Act contexts,²⁷⁹ construe a Rule in accord with the Rule's text, history, and purposes, as set forth in the Advisory Committee Notes.²⁸⁰

A. *Avoidance by Analogy to the Canon to Construe Statutes to Avoid an Unconstitutional Interpretation*

1. *Justice Scalia, in Dicta, Endorses a Type of Classical Avoidance*

In the portion of his opinion that attracted five justices,²⁸¹ Justice Scalia reiterated the two-part framework for resolving REA issues that has been standard since *Hanna v. Plumer*²⁸² and also discussed in dicta an avoidance canon for Federal Rule-state law conflicts. The REA framework, he noted, entails a twofold inquiry. First, one must ask whether the disputed point falls within the scope of the Federal

²⁷⁸ Justice Stevens, at times, states broadly that “federal rules cannot displace a State’s definition of its own rights or remedies.” *Shady Grove*, 130 S. Ct. at 1459. Although this is, as a general matter, true, the Court has also recognized that “[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants’ substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.” *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5-6 (1987) (citing *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946); 19 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4509, at 145-46 (1982)).

²⁷⁹ See *supra* notes 223-259, and accompanying text.

²⁸⁰ See *Bone, To Encourage Settlement*, *supra* note 20, at (concluding that the text and purpose of Rule 68 better explained the Rule than the Court’s plain language approach, in *Marek v. Chesny*, 473 U.S. 1 (1985), and that, when construing Federal Rules in light of the substantive rights limitation, the Rules should be accorded *Hanna*’s presumption of validity only if they “further the Rule’s actual purpose in some sufficiently direct way”); Nathan R. Sellers, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 *LOY. U. CHI. L.J.* 327, 328-39 (2011) (concluding that the Court should amend Rules only through the formal Enabling Act process because of the opportunity for input from diverse constituencies, the greater ability to make systemic changes through the rulemaking process, the ability to clarify amendments, and the opportunity for review by Congress); Struve, *supra* note 58, at 1124-1141, 1147 (suggesting that the nature of the Enabling Act process and reality of the rulemaking process counsel restraint in Court construction of Federal Rules and that the Court should “give[] authoritative weight to the Advisory Committee Notes”). See also Burbank & Wolff, *supra* note 58, at 48-49 (advocating that unless a Federal Rule “actually makes a policy choice that Congress has had an opportunity to review [following its prescribed Enabling Act process] . . . the role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized” and emphasizing as well that “many, if not most, of the Federal Rules are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges”).

²⁸¹ Justice Scalia was joined by Justices Roberts, Stevens, Thomas, and Sotomayor in Sections I and II.A. of his opinion.

²⁸² 380 U.S. 460, 463-65, 469-71 (1965).

Rule,²⁸³ or as Justice Scalia stated in *Shady Grove*, in perhaps a broader formulation of the scope inquiry, whether the Rule and arguably conflicting state law “answer[] the same question.”²⁸⁴ If the answer to that question is affirmative, then, in contrast to the “relatively unguided *Erie* choice” under the RDA, one must inquire whether the Rule is within Congress’s constitutional rulemaking authority and within the limits of rulemaking authority delegated to the Supreme Court in the REA.²⁸⁵

With respect to the initial inquiry regarding whether a Federal Rule and state law conflict, Justice Scalia, in dicta, endorsed a type of classical avoidance canon – avoidance that is triggered if a Rule is susceptible of two meanings, one that *would* violate the substantive rights proviso and one that would not.²⁸⁶ This recharacterizes slightly, but significantly, the avoidance analysis Justice Scalia has used in previous opinions.²⁸⁷ Of equal importance, Justice Scalia’s analysis of the scope of Rule 23(b) in *Shady Grove* differs from his avoidance analysis in prior opinions in that he no longer appears willing to find the Federal Rule ambiguous or susceptible of two meanings and thus to permit a limiting construction.²⁸⁸

Justice Scalia has long recognized avoidance as a legitimate principle of statutory or Rule interpretation in *Erie* cases,²⁸⁹ but his prior opinions turned at least in part on avoidance to prevent substantial disuniformity of outcome in state and federal courts, i.e., on federalism interests.²⁹⁰ Thus, his formulation of avoidance was perhaps in need of recalibration, but not of the significant dismantling it seems to undergo in *Shady Grove*.

In his dissenting opinion in the 1987 case *Stewart Organization, Inc. v. Ricoh Corp.*,²⁹¹ Justice Scalia outlined an avoidance canon for congressional statutes in potential conflict with state law that is substantially similar to “classical” avoidance,

²⁸³ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) (Scalia, J., opinion of the Court).

²⁸⁴ *Shady Grove*, 130 S. Ct. at 1437, 1439 (Scalia, J., opinion of the Court).

²⁸⁵ *Shady Grove*, 130 S. Ct. at 1437 (Scalia, J., opinion of the Court).

²⁸⁶ *Shady Grove*, 130 S. Ct. at 1441-42 & nn.7-8 (Scalia, J., opinion of the Court).

²⁸⁷ *See, e.g., Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-04 (2001); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37 (1988).

²⁸⁸ *Shady Grove*, 130 S. Ct. at 1437 (Scalia, J., opinion of the Court) (finding that “[b]y its terms, [Rule 23(b)] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action” and, moreover, that “Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule’s prerequisite are met”). *See Young, supra* note 56, at 1549, 1577 (indicating that “the importance of any given canon or rule of construction will be, to a considerable extent, a function of the willingness of courts to find that statutes are “unclear”).

²⁸⁹ Justice Scalia used avoidance principles in his dissenting opinion in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988) and in his opinion for a unanimous Court in *Semtek*, 531 U.S. at 503-04.

²⁹⁰ *Semtek*, 531 U.S. at 503-04 (adopting a limiting construction of Rule 41(b) because a broader construction “would arguably violate the jurisdictional limitation of the Rules Enabling Act” and because, if broadly interpreted, the Rule would “in many cases violate the federalism principle of *Erie R. Co. v. Tompkins*”); *Stewart*, 487 U.S. at 37-38 (contending that statute should be read narrowly to “avoid significant disuniformity between state and federal courts”).

²⁹¹ 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).

which counsels construing a statute narrowly, if its most natural construction would be invalid.²⁹² He based avoidance on federalism interests,²⁹³ however, rather than on the separation of powers principles that underlie the substantive rights limitation of the REA. This is unsurprising since *Stewart* involved a federal statute in potential conflict with state law, rather than a Federal Rule-state law conflict. Federal statutes, of course, are not subject to the REA proviso prohibiting abridging, enlarging, or modifying substantive rights.²⁹⁴ Where Justice Scalia was perhaps analytically imprecise in *Stewart* was that, after formulating an avoidance canon regarding the federal statute at issue, he included Federal Rules, in dicta, as subject to the same avoidance principle.

In *Stewart*, the majority held that 28 U.S.C. § 1404(a),²⁹⁵ regarding transfer of suits among federal district courts, controlled the effect to be given to the parties' contractual choice of forum agreement.²⁹⁶ In dissent, Justice Scalia would have found § 1404(a), at best, ambiguous,²⁹⁷ and, thus, would have construed § 1404(a) narrowly. Justice Scalia urged that "[i]n deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits."²⁹⁸ He explained that, since *Erie*, when a Federal Rule or statute is not on point (that is, in making an "unguided *Erie* choice" under the RDA analysis), courts have strived for substantially uniform outcomes in cases that are in federal court based on diversity jurisdiction.²⁹⁹ That statement is unremarkable, at least with respect to Federal Rules. Justice Scalia concluded also that the impulse toward substantially uniform outcomes in federal and state courts derives from the constitutional and congressional plan for diversity jurisdiction.³⁰⁰ In language quoted in all three *Shady Grove* opinions,³⁰¹ Justice Scalia advised that the Court "should assume . . . when it is fair to do so, that Congress is just as concerned as we have been to avoid significant differences between state and federal courts in

²⁹² *Id.* (Scalia, J., dissenting).

²⁹³ *Id.* (Scalia, J., dissenting) (advocating a limiting interpretation of 28 U.S.C. § 1404(a) in order to "avoid the significant encouragement to forum shopping that will inevitably be provided by the interpretation the Court adopts").

²⁹⁴ *See, e.g.*, *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 470 (7th Cir. 1984) (holding that rules enacted by Congress are not subject to the substantive rights limitation of the REA); *see also* Genetin, *Conflicts Between Congressional Statutes and Federal Rules*, *supra* note 10, at 748.

²⁹⁵ 28 U.S.C. § 1404(a) provided as follows:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

²⁹⁶ *Stewart*, 487 U.S. at 29-31 (concluding that the flexible standard set forth in 28 U.S.C. § 1404(a) included consideration of the parties' private expression of preference regarding venue).

²⁹⁷ *Id.* at 38 (Scalia, J., dissenting).

²⁹⁸ *Id.* at 38 (Scalia, J., dissenting). Justice Scalia's articulation of avoidance also required that the limiting construction be a plausible interpretation of the text.

²⁹⁹ *Id.* at 37 (Scalia, J., dissenting).

³⁰⁰ *Id.* at 39 (Scalia, J., dissenting).

³⁰¹ *Shady Grove*, 130 S. Ct. 1441 & n. 7 (Scalia, J., opinion of the Court); *id.* at 1451 & n.5 (Stevens, J., concurring in part and concurring in judgment); *id.* at 1461 (Ginsburg, J., dissenting).

adjudicating claims.”³⁰² This may generally be an appropriate presumption with respect to congressional statutes,³⁰³ a subject that is beyond the scope of this Article. Justice Scalia’s inclusion, in dicta, of Federal Rules in his avoidance approach, however, was incomplete, since the substantive rights limitation of the REA provides the measure of Federal Rules.

Justice Scalia next addressed avoidance in *Semtek International Inc. v. Lockheed Martin Corp.*³⁰⁴ Writing for a unanimous Court, Justice Scalia used a type of serious doubts avoidance to construe Fed. R. Civ. P. 41(b) narrowly and, many have suggested, contrary to any plausible textual or historical construction of the Rule. Justice Scalia linked avoidance both to avoiding arguable violation of the substantive rights limitation of the REA,³⁰⁵ and to avoiding “violating the federalism principle of *Erie*.”³⁰⁶ Federalism interests still played a role, and perhaps a substantial role, in Justice Scalia’s view of avoidance, although Justice Scalia started to realign avoidance to include separation of powers concerns. Of course, as indicated earlier, the *Semtek* case represented an instance in which no avoidance canon, regardless of underlying premise, should have been available because the Rule was not capable of the narrowing construction adopted, consistent with text and history.³⁰⁷ Thus, the Court should have reached the issue of Rule validity.

In *Shady Grove*, Justice Scalia restated and narrowed any available avoidance principle, and he rejected “important state interests” and “state regulatory policies” as the guiding principle for avoidance. After determining that the Rule and state law were in conflict, Justice Scalia articulated an avoidance principle, in dicta, in *Shady Grove*, as follows: “If the Rule [is] susceptible of two meanings – one that would violate § 2072(b) and another that would not” – then the Rule at issue should be construed narrowly.³⁰⁸ In this restated avoidance principle, Justice Scalia corrected his prior use of avoidance in REA cases,³⁰⁹ which had focused in whole or in part on avoiding disuniformity of outcomes in federal and state courts.³¹⁰

Justice Scalia’s new formulation, however, limits the availability of an avoidance canon of Rule interpretation in several significant ways. First, he reverted to

³⁰² *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38 (1988) (Scalia, J., dissenting).

³⁰³ *See, e.g., Shady Grove Orthopedic Assocs., Inc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1451, 1453 (2010) (Stevens, J., concurring in part and concurring in judgment) (citing *Wyeth v. Levine*, 555 U.S. ___, ___, 129 S. Ct. 1187, 1194-95 (2009) for the proposition that a federal statute will not displace state law “unless that was the clear and manifest purpose of Congress”).

³⁰⁴ 531 U.S. 497, 501-05 (2001).

³⁰⁵ 531 U.S. at 504 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999)).

³⁰⁶ *Id.* at 504.

³⁰⁷ *See supra* notes 212-220, and accompanying text.

³⁰⁸ *Shady Grove*, 130 S. Ct. at 1441-42 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. at 842 and *Semtek*, 531 U.S. at 503-04).

³⁰⁹ *Shady Grove*, 130 S. Ct. at 1441-41 & n.2 (Scalia, J., opinion of the Court) (rejecting the suggested narrowing of Rule 23(b) based on “important state interests” and “state regulatory policies” as “standardless”).

³¹⁰ *See supra* notes 289-306, and accompanying text.

“classical” or “narrow” avoidance, no longer espousing avoidance based on serious doubts regarding Rule validity, but indicating, instead, that he would choose a limiting construction of an ambiguous Rule only if the Rule were susceptible of two constructions, one of which *would* violate the substantive rights limitation and the other of which would not. Second, Justice Scalia no longer construes Rules in terms of “limiting” or “reasonable” constructions³¹¹ or “broad”³¹² and “narrow” construction, but in terms of “artificial narrowing.”³¹³ Thus, Justice Scalia is not willing to find ambiguity in Rule 23(b), but construes the Rule, instead, in categorical terms based on its text, thus reminding that interpretive philosophy will directly impact the availability of avoidance. Third, the combination of Justice Scalia’s narrow definition of avoidance with his proposed broad standard for Rule validity means that avoidance will not be available in practice: A “classical” or narrow requirement that a Rule must be found to violate the substantive rights limitation to permit avoidance, combined with a “really regulates procedure” standard that admits of little if any possibility of Rule invalidity means that avoidance will be available in principle only. Such an approach presents the very real possibility of underprotecting the separation of powers boundary that Congress included in the REA and, correspondingly, underprotecting state substantive rights. Of course, Justice Scalia discussed avoidance only in dicta, and there certainly is a danger of reading too much into his brief discussion.

Tellingly, however, Justice Scalia turned to discussion of avoidance principles in *Shady Grove* only after he had dispelled any notion that Rule 23(b) could be ambiguous and that avoidance might play a role in interpreting the Rule. Before considering avoidance principles, Justice Scalia concluded that, by its terms, Rule 23(b) provided that a class action “may be maintained” if the requirements of Rule 23(a) and 23(b) are met.³¹⁴ Rule 23(b), Justice Scalia concluded, provides a categorical, one-size-fits-all formula for determining when a class action may be maintained.³¹⁵ Absent a conclusion that the language of the Rule is ambiguous or capable of more than one interpretation, no avoidance principle can apply.³¹⁶ Further, the “really regulates procedure” standard Justice Scalia recognizes for Rule validity is extremely Rule protective.³¹⁷ What matters is the Federal Rule itself and what it regulates, not whether the Rule affects a litigant’s substantive rights: “If [a Rule] governs only ‘the manner and the means’ by which the litigants’ rights are ‘enforced,’ it is valid; if it alters ‘the rules of decision by which [the] court will adjudicate [those] rights,’ it is not.”³¹⁸ Under this standard, Justice Scalia concluded

³¹¹ *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503, 505 (2001).

³¹² *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, at 37-38 (1988).

³¹³ *Shady Grove*, 130 S. Ct. at 1441 (Scalia, J., opinion of the Court).

³¹⁴ *Shady Grove*, 130 S. Ct. at 1437 (Scalia, J., opinion of the Court).

³¹⁵ *Id.* at 1437, 1440 (Scalia, J., opinion of the Court).

³¹⁶ *See supra* note 193.

³¹⁷ *Id.* at 1442 (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); *Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987)).

³¹⁸ *Shady Grove*, 130 S. Ct. at 1442, 1444 (Scalia, J., plurality opinion) (quoting *Miss. Pub’g Corp. v. Murphree*, 326 U.S. 438, 446 (1946) (internal quotation marks omitted)).

that Rule 23(b) is simply a claims joinder rule that mandates joinder at plaintiff's option when the enumerated conditions of 23(a) and (b) are met.³¹⁹

In summary, Justice Scalia backed away from a strong version of an avoidance canon, and he argued for a standard of Rule validity under which Federal Rules would rarely, if ever, be found to violate the substantive rights limitation. Both conclusions protect Congress's goal of delegating authority to the Supreme Court to create uniform, predictable, and simple procedural rules for the federal courts and protect the integrity of the Federal Rules, but, in tandem, they seem also to permit disservice of Congress's additional goal that Federal Rules not encroach on Congress's substantive rulemaking choices.

Moreover, the Court's previous decisions in *Semtek*, *Gaspirini*, and *Walker* reveal its hesitance in permitting Federal Rules regularly to preempt potentially substantive state law. This reluctance suggests that, if a standard for Rule validity does not provide for meaningful consideration of substantive rights, the Court will continue to seek means of avoiding the issue of Rule validity, including continued ad hoc construction of Rules to accommodate state interests, adoption of a modern or serious doubts canon of avoidance, promulgation of Rules that more nearly include only "case processing" or "housekeeping" standards,³²⁰ and perhaps acceptance of increased suggestions for congressional cooperation or participation in Rule promulgation.³²¹

2. Justice Stevens, in Concurrence, Espouses Avoidance Based on Serious Doubts Regarding Rule Validity

Justice Stevens joined the portion of Justice Scalia's opinion that discussed avoidance in dicta, but, in his separate concurrence, he also amplified his views on avoidance and developed a broader avoidance principle that incorporates a serious doubts methodology.³²² Like Justice Scalia, Justice Stevens began his analysis with the traditional *Hanna* acknowledgement that REA issues under *Erie* present two questions – (1) whether the scope of a Federal Rule is "sufficiently broad" to "control the issue' . . . , thereby leaving no room for the operation" of apparently

³¹⁹ *Id.* at 1442-43 (Scalia, J., plurality opinion).

³²⁰ See Bernadette Bollas Genetin, *Summary Judgment and the Influence of Federal Rulemaking*, 43 AKRON L. REV. 1107, 1117 (2010) (observing that the Enabling Act process, as a practical matter, requires consensus, and that it has become most effective when it "codifies existing practice, makes stylistic changes that consciously avoid change to content, makes housekeeping or claims processing changes, as with the recent time computation amendments, or alters Rules in ways that can otherwise be reached by consensus").

³²¹ See, e.g., Bone, *Process of Making Process*, *supra* note 20, at 890; Burbank, *supra* note 53, at 1737-42; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1234-36, 1247-48 (1996); Stephen N. Subrin, *supra* note 71, at .

³²² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448-50 (2010) (Stevens, J., concurring in part and concurring in judgment).

conflicting state law;³²³ and (2) if so, whether the Rule is valid, i.e., constitutional and in compliance with the substantive rights limitation of the REA.³²⁴ Justice Stevens, however, concluded that both inquiries can be relevant to the scope of a Federal Rule. He reasoned that if a Federal Rule appears to violate the substantive rights proviso, the second “substantive rights” inquiry might “bleed back into the first”³²⁵ and counsel a narrower construction of the Federal Rule that would avoid a clash of Federal Rule and state law:

When a federal rule *appears* to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result. . . . And when such a “saving” construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule.³²⁶

This formulation adopts the broader doubts model of avoidance, advising avoidance when it appears that a Rule will impermissibly impact substantive rights,³²⁷ without requiring the Court to determine that, in fact, the construction of the Rule *would* violate the substantive rights limitation (a position that Justice Scalia seems to prefer in his discussion of avoidance in *Shady Grove*³²⁸). Justice Stevens joins his serious doubts model of avoidance with an acknowledgment that the substantive rights limitation creates a more substantial hurdle than Congress’s authority to create rules that are “rationally capable of classification as procedural.”³²⁹ The Court has used the serious doubts avoidance canon in prior

³²³ *Id.* at 1451 (Stevens, J., concurring in part and concurring in judgment) (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 & n.9 (1980)).

³²⁴ *Id.* at 1451 (Stevens, J., concurring in part and concurring in judgment).

³²⁵ *Id.* at 1452 (Stevens, J., concurring in part and concurring in judgment).

³²⁶ *Id.* at 1452 (Stevens, J., concurring in part and concurring in judgment) (emphasis added) (citing *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)).

³²⁷ *Id.* at 1452 & n.6 (Stevens, J., concurring in part and concurring in judgment) (citing *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)). Justice Stevens does not apply the avoidance canon he suggests in *Shady Grove* because he finds the state law to be procedural. *Id.* at 1459-60. Thus, he also does not discuss the interpretive methodology a court should use in interpreting Federal Rules. In Section IV, I suggest that courts should consider the text and the Advisory Committee Notes. Compare Struve, *supra* note 58, at 1124-41, 1147 (suggesting that Supreme Court should give authoritative weight to the Advisory Committee Notes and materials), with Moore, *supra* note 10, at 1047-53 (proposing that Supreme Court use an active or dynamic method of interpreting Federal Rules). See also Burbank & Wolff, *supra* note 58, at 48-49 (advocating that unless a Federal Rule “actually makes a policy choice that Congress has had an opportunity to review [following its prescribed Enabling Act process] . . . the role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized” and emphasizing as well that “many, if not most, of the Federal Rules are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges”).

³²⁸ See *supra* notes 308-313, and accompanying text.

³²⁹ *Shady Grove*, 130 S. Ct. at 1448-50 (Stevens, J., concurring in part and concurring in judgment). Justice Stevens also determined that Congress’s delegation of rulemaking authority to the Court, rather than to a political branch, evidenced Congress’s intent to hold Federal Rules to a more stringent standard of validity

REA cases.³³⁰ It has also used a serious doubts avoidance model to assist in policing constitutional and statutory boundaries that are, like the substantive rights limitation, characterized by difficult line-drawing decisions and, thus, can lead to underenforcement of structural norms, such as separations of powers,³³¹ and in policing ambiguous delegations of authority.³³²

Under Justice Stevens’s serious doubts conception of avoidance, if a Rule appears to be in violation of the substantive rights limitation and a narrow construction is available, a collision of Federal Rule and state law will be averted, and the court would use an RDA analysis under *Erie*.³³³ When however, “such a ‘saving’ construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule.”³³⁴ Importantly, Justice Stevens concludes that it is through a combination of an application of avoidance when available and finding a Federal Rule invalid when necessary that a court demonstrates “sensitivity to important state interests” and “regulatory policies.”³³⁵ For Justice Stevens, then, (as, of course, for Justice Scalia³³⁶) respect for “important state interests” and “regulatory policies” no longer drives a court’s decision to avoid a conflict, unless the state law “is part of a State’s framework of substantive rights or remedies.”³³⁷ Instead,

than the standard applied to congressional statutes. *Id.* at 1452 (Stevens, J., concurring in part and concurring in judgment).

³³⁰ See, e.g., *Semtek*, 531 U.S. at 503-04; *Ortiz*, 527 U.S. at 842, 845; *Amchem*, 521 U.S. at 612-13; *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96-97 (1991); see also *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 542-44 & n.2 (1984) (Stevens, J., concurring in judgment); *accord Chesny v. Marek*, 720 F.2d 474, ___ (7th Cir. 1984) (Posner, J.), *rev’d*, 473 U.S. 1 (1985).

³³¹ See, e.g., *Barrett*, *supra* note 56, at 171 (noting the use of avoidance to protect values that may be underenforced); *Young*, *supra* note 56, at 1552-53 (indicating that avoidance canons are particularly appropriate when the legal standard is characterized by difficulty of drawing bright lines and where avoidance can help prevent “confrontations between the courts and political branches”).

³³² *Frickey*, *supra* note 193, at 461-62. Use of the serious doubts canon in Rule interpretation differs from its use in avoiding constitutional violations. In the constitutional context, the Court is construing a statute of Congress and may, in avoiding a constitutional decision, find the statute inapplicable in a manner tantamount to finding it unconstitutional. Avoidance, thus, permits a court to find a statute inapplicable as a subconstitutional manner and may deny statutory application when a straightforward decision would have rendered the application at issue constitutional. In the Rule interpretation context, by contrast, avoidance means that the Supreme Court will find its own Rule inapplicable and will construe Congress’s delegation to it more narrowly, in furtherance of Congress’s limitation of Court rulemaking. This self-limiting action of the Court in prospective rulemaking is less suspect than avoidance in the statutory concept, but it may interfere with Congress’s second goal for rulemaking – the creation of uniform and consistent procedure for the federal court system.

³³³ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring in part and concurring in judgment).

³³⁴ *Id.* (Stevens, J., concurring in part and concurring in judgment).

³³⁵ *Id.* (Stevens, J., concurring in part and concurring in judgment).

³³⁶ See *supra* note 309, and accompanying text.

³³⁷ Justice Stevens emphasizes that Federal Rules will still be interpreted with “some degree of ‘sensitivity to important state interests and regulatory policies’ . . . and applied to diversity cases against the background of Congress’ command that such rules not alter substantive rights and with consideration of ‘the degree to which the rule makes the character and result of the federal litigation stray from the course it would follow in state courts.’” *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in judgment) (citations omitted). He would limit the instances in which state law would

respect for “important state interests” and “regulatory policies” is the result of appropriate application of the substantive rights limitation, that is, it is the result of the Court’s construing the Federal Rule narrowly to avoid a conflict if such a construction is available, and the Court’s corresponding willingness to find a Rule invalid when necessary.³³⁸

Justice Stevens also defined the substantive rights limitation more broadly than Justice Scalia, and that broader reach is integral to his conclusion that proper application of the substantive rights limitation produces the respect for state substantive rights that Congress requires in the REA. For Justice Stevens, a Federal Rule violates the substantive rights limitation of the REA if it displaces a state law that is “procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”³³⁹

In applying his framework, however, Justice Stevens stops short of using his carefully considered avoidance canon of interpretation because he determined that the state law was procedural only.³⁴⁰ Justice Stevens concedes that one could argue, as the dissent did, that “class certification [in the face of CPLR § 901(b)’s prohibition on class actions] would enlarge New York’s ‘limited’ damages remedy”³⁴¹ and, thus, that § 901(b) served both procedural and substantive purposes. In fact, Justice Stevens concluded that there are “two plausible competing narratives” regarding § 901(b) – one narrative that would present § 901(b) as a procedural rule intertwined with a state right or remedy and, thus, as a rule that would function to define the scope of the state-created right³⁴² and a second narrative that would define § 901(b) as procedural only.³⁴³ In such an instance, Justice Stevens found it “obvious” that the Court should “respect the plain textual reading of § 901(b).”³⁴⁴ In the potential clash of a Federal Rule and a purely

influence a court’s decision to avoid a conflict to those cases in which “the state law actually is part of a State’s framework of substantive rights or remedies.” *Id.*

³³⁸ Justice Stevens realigns a court’s use of “sensitivity to important state interests” and “regulatory policies” from relying on it to guide avoidance to recognizing it as the result of abiding by the REA requirement that a Rule not “abridge, enlarge or modify a substantive right”:

A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. *And absent a governing federal rule, a federal court must engage in the traditional Rules of Decision Act inquire, under the Erie line of cases. This application of the Enabling Act shows “sensitivity to important state interests,” . . . and “regulatory policies,” . . . but it does so as Congress authorized, by ensuring that federal rules that ordinarily “prescribe general rules of practice and procedure,” § 2072(a), do not “abridge, enlarge or modify any substantive right.”*

Shady Grove, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in judgment) (emphasis added).

³³⁹ *Id.* (Stevens, J., concurring in part and concurring in judgment).

³⁴⁰ *Id.* at 1457-60 (Stevens, J., concurring in part and concurring in judgment).

³⁴¹ *Id.* at 1459 (Stevens, J., concurring in part and concurring in judgment).

³⁴² *Id.* at 1459-60 (Stevens, J., concurring in part and concurring in judgment).

³⁴³ *Id.* at 1457-59 (Stevens, J., concurring in part and concurring in judgment).

³⁴⁴ *Id.* at 1459-60 (Stevens, J., concurring in part and concurring in judgment).

procedural state requirement, of course, a Federal Rule will not abridge, enlarge or modify a substantive right and there is, correspondingly, no need to construe the Federal Rule narrowly. After developing a more sensitive avoidance canon for the REA analysis, Justice Stevens's opinion is disappointing in that it (1) fails to make a contextual examination of Rule 23(b), including examination of history and Advisory Committee Notes, to determine if, in fact, the Rule was intended to be mandatory at the plaintiff's option; and (2) opts for an unnecessarily restrictive reading of state law. Although the purpose of this Article is not to resolve conclusively the clash between Rule 23(b) and CPLR § 901(b), Justice Stevens's conclusion that there are two competing narratives regarding § 901(b) is premised on a less than convincing plain meaning construction of CPLR § 901(b) and a similarly unconvincing conclusion argument that class action joinder is "classically procedural," and analogous to setting filing fees or briefing deadlines.³⁴⁵

B. *Avoidance Based on Respect for Important State Interests*

In a dissenting opinion joined by Justices Kennedy, Breyer, and Alito, Justice Ginsburg discusses avoidance based on an accommodation or interest balancing approach to avoiding conflict.³⁴⁶ She also states that the Court's prior opinions have incorporated an interest balancing approach to avoiding conflict: "In our prior decisions on point, . . . we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."³⁴⁷ Avoidance, for Justice Ginsburg, springs directly from federalism concerns³⁴⁸ and is not ostensibly limited by the substantive rights prohibition of the REA. Indeed, the dissent emphasizes repeatedly that the Court has adopted and should continue to adopt narrowing constructions of Federal Rules to serve important state interests or regulatory policies.³⁴⁹

The dissenting opinion is also premised in large part on a marshalling of cases to establish that the Supreme Court's pre- and post-*Hanna* decisions demonstrate unwavering vigilance in construing "Federal Rules to avoid conflict with state laws" and "to avoid conflict with important state regulatory policies."³⁵⁰ As discussed above, the *Erie* cases do not line up uniformly in support of any brand of avoidance canon. Avoidance in pre-*Hanna* cases sought to protect the Federal Rules, not

³⁴⁵ *Id.* at 1457-79 (Stevens, J., concurring in part and concurring in judgment).

³⁴⁶ *Shady Grove*, 130 S. Ct. at 1461. (Ginsburg, J., dissenting).

³⁴⁷ *Id.* Justice Ginsburg also references several times an article by former California Supreme Court Justice Roger J. Traynor entitled, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 668-69 (1959), in which Justice Traynor recommended an interest balancing approach to reconciling potentially conflicting state laws. In language similar to that used by Justice Ginsburg in *Shady Grove*, Justice Traynor counseled that "courts must be on the alert against making exceptions . . . that would defeat a legitimate interest of the forum state without serving the interest of any other state." *Id.*

³⁴⁸ *Shady Grove*, 130 S. Ct. at 1464 (Ginsburg, J., dissenting) (quoting *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 438 & nn.7, 22 (1996)).

³⁴⁹ *Id.* at 1461-64 (Ginsburg, J., dissenting).

³⁵⁰ *Id.* at 1462-63 (Ginsburg, J., dissenting).

important state interests.³⁵¹ Avoidance in post-*Hanna* cases varied, but has been based primarily on protecting important state interests and regulatory policies.³⁵² Allowing an unbounded concept of “state interest” to guide avoidance,³⁵³ however, rather than the REA’s focus on abridging, enlarging, or modifying substantive rights, risks returning to the pre-*Byrd* and pre-*Hanna* position of elevating, Rule by Rule, the states’ authority over congressional authority in matters of federal procedure. Thus, rather than an unadorned interest balancing approach to avoidance,³⁵⁴ avoidance should be based on the nature and extent of a Federal Rule’s impact on substantive law.

IV. SERIOUS DOUBTS AS AN APPROPRIATE MODEL FOR AVOIDANCE UNDER THE REA

Because the Court has failed to settle on either a consistent methodology or an appropriate guiding principle for avoidance, its avoidance jurisprudence in Enabling Act cases has been inconsistent and has approached the murky quality so often associated with the *Erie* doctrine. In this Section, I recognize, first, that avoidance should be based on separation of powers constraints and, propose, second, that it be based on the serious doubts model of avoidance that the Court has often used in REA cases. The methodology for avoidance would, thus, be akin to that proffered by Justice Stevens in *Shady Grove*,³⁵⁵ but the Court should limit the range of permissible narrowing constructions of a Federal Rule to those that can be supported by consideration of Rule text and Rule history and purposes, as set forth in Advisory Committee Notes.³⁵⁶ This limitation on permissible savings constructions will prevent ad hoc avoidance and “rewriting” of Federal Rules, but, in

³⁵¹ As demonstrated above, in *Palmer v. Hoffman*, 318 U.S. 109 (1943) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court used avoidance to protect the Federal Rule, at issue, not to avoid trenching on state prerogatives. See *supra* notes 91-153, and accompanying text. The pre-*Hanna* case of *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) was construed in *Hanna* to be premised on avoidance, but at the time of its issuance, the case was uniformly construed as one in which state law prevailed over the Federal Rule, under outcome-determinative principles, and it seemed, moreover, to toll the death knell of the Federal Rules in diversity actions. The use of avoidance in *Ragan* thus, would also have protected the Federal Rule not state interests. Pre-*Hanna* avoidance, thus, provides scant support for a contemporary avoidance canon premised on protection of state interests and regulatory policies.

³⁵² See *supra* notes 186-220, and accompanying text.

³⁵³ As Justice Stevens recognized, “[t]he Enabling Act’s limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State’s definition of its own rights or remedies.” *Shady Grove*, 130 S. Ct. at 1459 (Stevens, J., concurring in part and concurring in judgment). Only once and indirectly, in quoting Professor Ely, does Justice Ginsburg concede that “it is relevant ‘whether the state provision embodies a substantive policy or represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation.’” *Id.* at 1466 (Ginsburg, J., dissenting).

³⁵⁴ By contrast, in his suggestion for use of a comparative impairment approach to avoidance, Professor Lynch would limit the approach to instances in which there is a strong likelihood that the state interest might affect substantive rights – potential conflicts of Federal Rules and state litigation reform law. See Lynch, *supra* note 36.

³⁵⁵ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1451-52 (2010) (Stevens, J., concurring in part and concurring in judgment).

³⁵⁶ See *supra* note 193, and accompanying text.

cases of serious doubt regarding Rule validity, it will give the nod to protecting Congress's superior substantive lawmaking authority. Moreover, if no limiting construction is available, the framework requires the court to address Rule validity.

Any avoidance canon that will assist in defining the substantive rights limitation of the REA must recognize that the limitation enforces a separation of powers boundary, which allocates prospective rulemaking authority to the Supreme Court but reserves substantive lawmaking choices to Congress.³⁵⁷ Thus, the Court should acknowledge that the REA's prohibition on Rules that "abridge, enlarge or modify any substantive right" protects against Court Rules that would intrude on Congress's substantive lawmaking prerogative. Professor Burbank's germinal article uncovering the historical foundations of the REA reveals the separation of powers origin of the substantive rights limitation.³⁵⁸ As Professor Burbank has emphasized, however, federalism interests are served by the REA's allocation of power between the Supreme Court and Congress, but, as a "probable effect, rather than the primary purpose of the allocation scheme established by the [Rules Enabling] Act."³⁵⁹ The REA's date of enactment – four years before the *Erie* decision – also supports that the purpose was not to protect directly federalism interests.³⁶⁰ Thus, a court grappling with whether a Rule complies with the substantive rights limit weighs competing federal interests – the interest in protecting Congress's substantive lawmaking authority and Congress's intent that the Federal Rules be uniform, predictable, and simple.

The recognition that the substantive rights limitation protects against Court intrusion into substantive lawmaking choices of Congress means that "sensitivity to important state interests" and "important state regulatory policies" cannot be the guiding principle for avoidance. Five justices in *Shady Grove* recognize the illegitimacy of unlimited reliance on these factors,³⁶¹ but the four dissenting justices

³⁵⁷ Burbank, *supra* note 23, at 1025-26.

³⁵⁸ *Id.* at 1025-26, 1106-07

³⁵⁹ *Id.* at 1025-26. Professor Burbank stated as follows:

The relevant substantive rights under the [Rules Enabling] Act, however, are not . . . those that reflect existing state substantive policy choices on the same subject covered by a Rule. The purpose of the procedure/substance dichotomy is not to protect state or federal policy choices on such matters, although it may have that effect. Its purpose is, rather, to allocate policy choices – to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights.

Id. at 1113.

³⁶⁰ Burbank, *supra* note 23, at . . . See also Ely, *supra* note 15, at 720-21 ("It is true that there is no evidence to suggest that those responsible for the passage of the Enabling Act – which was finally enacted in 1934 (four years before *Erie*) after many years of skirmishing – had the Rules of Decision Act in mind as a guide to the boundaries of the Supreme Court's authority").

³⁶¹ *Shady Grove*, 130 S. Ct. 1441 n.7 (Scalia, J., opinion of the Court). Justice Scalia observed as follows:

The dissent also suggests that we should read the Federal Rules "with sensitivity to important state interests" and "to avoid conflict with important state regulatory policies." . . . The search for state interest and policies is just as standardless as the "important or substantial" criterion we rejected in *Sibbach v. Wilson*. . . .

are insistent that the Court should interpret Federal Rules with “an awareness of, and sensitivity to, important state regulatory policies”³⁶² and “important state interests.”³⁶³ Moreover, one searches the majority and concurring opinions in vain for a direct statement that separation of powers interests animate the substantive rights limitation. Using state interests, and certainly the unbounded state interests discussed in the *Shady Grove* dissent,³⁶⁴ as the controlling principle of avoidance elevates state power regarding federal procedure over the authority of both Congress and its delegate, the Supreme Court. Strikingly, it threatens to create, Rule-by-Rule, a legal climate eerily similar to the pre-*Byrd* and pre-*Hanna* outcome-determinative period, in which in Federal Rule-state law conflicts, state law seemed to override the Federal Rules and the Court created dual meanings for Federal Rules, one of which would apply in diversity cases and the other in federal question cases.³⁶⁵ Ultimately, an unbounded interest balancing approach based on important

Id. Justice Stevens, in his separate concurrence, limits, rather than rejects, the application of state interests. Justice Stevens emphasizes that Federal Rules will still be interpreted with “some degree of ‘sensitivity to important state interests and regulatory policies’ . . . and applied to diversity cases against the background of Congress’ command that such rules not alter substantive rights and with consideration of ‘the degree to which the rule makes the character and result of the federal litigation stray from the course it would follow in state courts.’” *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in judgment) (citations omitted). He would limit the instances in which state law would influence a court’s decision to avoid a conflict to those cases in which “the state law actually is part of a State’s framework of substantive rights or remedies.” *Id.* (Stevens, J., concurring in part and concurring in judgment).

³⁶² *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

³⁶³ *Id.* at 1464 (Ginsburg, J., dissenting).

³⁶⁴ *Id.* at 1460-61, 1463-64 (Ginsburg, J., dissenting).

³⁶⁵ Compare Gavit, *supra* note 29, at 3. Professor Gavit stated as follows:

[T]he most recent cases have applied an extended version of the doctrine of *Erie* as against the Federal Rules; and those cases appear to warrant the broad statement that in a diversity case, in the event of a conflict between a state rule of procedure and the Federal Rules of Civil Procedure, the federal district court must apply the state rule and not the federal rule if the state advantage is claimed to be one of “substantial importance.” It appears to be conceded on all fronts that in litigation involving federal law the Federal Rules of Civil Procedure are to be administered under the usual standards of interpretation. They are procedure in those cases; yet they are “substance” in a diversity case.

Id.; Merrigan, *supra* note 29, at 719. Merrigan similarly concluded as follows:

It is noteworthy that the Court also held in the *Ragan* case that Rule 3 still prevails in cases involving only a federal question. In such a case, irrespective of state requirements, the action is still commenced and the applicable statute of limitations tolled by the mere filing of the complaint. In sum and substance, therefore, the Court delimited Rule 3 in diversity of citizenship cases, but preserved it for all other types of civil actions. As a result, all “strictly federal” cases will now be governed by Rule 3, while diversity cases must of necessity be commenced in accordance with prevailing state law.

Id. (citations omitted), with Dudley & Rutherglen, *supra* note 44, at 743-44. Professors Dudley and Rutherglen concluded as follows:

The most frequently felt temptation – at least at the Supreme Court level – is to construe federal law narrowly to avoid a conflict with state law. This was certainly the temptation to which the Court succumbed in *Walker*, *Gasperini*, and *Semtek* The . . . unhappy outcome is illustrated by *Walker* and *West*, where supposedly uniform federal procedural rules become two-headed monsters meaning different things depending on whether the plaintiff’s claim is based on state or federal law.

state interests treats the Federal Rule and state law as though they were adopted by co-equal sovereigns. It permits the law serving the “greater” interest to control or permits an accommodation of the two laws, but it ignores the constitutional superiority of federal law in event of conflict and, as applied, it has also minimized the federal interest in creating a uniform national procedure.³⁶⁶

The teaching of *Hanna* is to the contrary— Congress’s delegation of rulemaking authority to the Supreme Court combined with the Supremacy Clause’s elevation of federal law over state law require that Federal Rules will preempt some interests and regulatory policies that are important to states. Similarly, the supersession clause of the REA permits Federal Rules that do not impact substantive rights impermissibly to supersede congressional statutes.³⁶⁷ The Federal Rules, then, do not operate only when nonconflicting or when in conflict with “unimportant” federal or state law, but have real power to override laws of both Congress and the states, as long as the Rules do not impact impermissibly substantive rights. Furthermore, the REA cases have demonstrated that there is no identity principle of separation of powers and federalism in construing the substantive rights limitation. That is, use of a separation of powers principle that prevents Court Rules from intruding impermissibly into Congress’s substantive policy choices will protect state law as a residual matter. Use of federalism principles as the touchstone for avoidance, however, will not protect Congress’s interest in permitting the Supreme Court to establish uniform procedural Rules for the federal courts but ensuring that those Rules do not impermissibly impact substantive rights. Instead, a federalism focus for avoidance permits subordination of federal procedural rulemaking authority to state law and permits differing interpretations of the Rules in diversity and federal question cases. Thus, rather than ensuring protection of the separation of powers boundary in the face of difficult line drawing issues, use of important state interests and regulatory policies to guide avoidance may permit state law to override potentially valid Federal Rules.³⁶⁸

Reorienting the focus of avoidance to key on preventing Court Rules from impermissibly abridging substantive rights would be a good first step in establishing the proper role of avoidance in Enabling Act cases and, with five justices rejecting unlimited “sensitivity to important state interests” and “important state regulatory policies” as the basis for limiting Federal Rules, perhaps the *Shady Grove* case has taken that first step. There is, in *Shady Grove*, however, no direct

Id.; Struve, *supra* note 58, at 1150-51 (concluding that “to the extent the Court views the Enabling Act limitation as serving federalism, and not separation of powers concerns, . . . the Court’s avoidance doctrine can produce Rules that have one meaning in diversity cases and another in federal question cases”).

³⁶⁶ See, e.g., Burbank, *supra* note 23, at ___; Dudley & Rutherglen, *supra* note 44, at 743-44, 747-48; Hill, *supra* note 29, at ___; McCoid, *supra* note 39, at 898 & n.62.

³⁶⁷ For a discussion of the supersession clause of the REA that permits Federal Rules to supersede congressional statutes, if in compliance with the substantive rights limitation, see *supra* note 10.

³⁶⁸ See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). See Burbank, *supra* note 23, at 1042-46.

statement that separation of powers concerns animate the substantive rights limitation. The second step in according avoidance its proper role in defining the substantive rights limitation is to invoke serious doubts avoidance and to establish a workable definition for the substantive-procedural divide. Although identification of that standard is beyond the scope of this Article, an administrable standard is essential to a serious doubts analysis because the serious doubts avoider must consider whether there is a serious doubt regarding Rule validity (though she need not definitely resolve the issue of Rule validity) before turning to possible limiting constructions for a Federal Rule.

Justice Stevens recommended serious doubts avoidance in his concurrence in *Shady Grove*, stating that the second phase of the *Hanna* inquiry regarding Rule validity “may well bleed back into the first,” i.e., determination of Rule scope³⁶⁹: “When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result.”³⁷⁰ Serious doubts avoidance based on separation of powers constraints would favor a restrained reading of a Rule, when possible, to limit tensions between the Supreme Court and Congress caused by the Court’s exceeding the limitation.³⁷¹ The Supreme Court has also used a serious doubts model in other REA cases.³⁷² Under the serious doubts model, the first analysis of scope of the Federal Rule, will involve a look at the second-step Rule validity analysis. The doubts principle, thus, assumes a shared understanding of the standard at issue, but that the standard may involve difficult line drawing issues.

The crisper the standard and the easier it is for courts to apply the standard, the more, theoretically, serious doubts avoidance will play a supporting role, rather than a leading role, in defining the substantive rights divide. The clear standard of *Hanna*, however, which seemed not to provide sufficient protection for state law, had the opposite effect, causing the Court to search for avenues to avoid apparent conflicts and that would permit application of the state-protective RDA analysis. Thus, the Court has demonstrated that an appropriate standard must not only be clear to reduce reliance on avoidance techniques, it must also be sufficiently nuanced to include meaningful consideration of all relevant interests. Justice

³⁶⁹ *Shady Grove*, 130 S. Ct. at 1452 (citations omitted) (Stevens, J., concurring in part and concurring in judgment).

³⁷⁰ *Id.*

³⁷¹ See *supra* note 332, indicating that use of a serious doubts avoidance principle in Rule interpretation is less problematic than in narrow construction of a statute to avoid an unconstitutional result, because the Court is self-limiting its own Rule in order to comply with Congress’s separation of powers constraint, rather than narrowing a congressional statute. The narrowing of a Federal Rule, however, can threaten Congress’s additional goal in enacting the REA – that the Supreme Court create uniform and consistent Rules for the federal procedural system.

³⁷² See *supra* note 39, at 898 & n.62. Professor McCoid observed that the interest in the integrity of the federal system that is a formative purpose of the Federal Rules and that is emphasized in *Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965) is not uniformly evidenced in each Rule. He concluded, in fact, that the interest in “unity of the rules” was not at issue in case of the service Rule at issue in *Hanna*. *Id.* That is, the federal system could tolerate and, in fact, the Rules provided for, varying methods of service.

Scalia's proposed clear and easily administrable "really regulates procedure" standard for Rule validity in *Shady Grove*, thus, may paradoxically also lead to increased reliance on avoidance techniques.³⁷³

As the standard for defining the substantive rights limit of the REA becomes less clear and line-drawing more difficult, of course, courts would turn more often to avoidance, and here I recommend serious doubts avoidance, which has proved effective in dealing with standards characterized by difficult line-drawing.³⁷⁴ With the REA's dual interests in protecting substantive rights and protecting the integrity of federal procedure as an independent court system, it is likely that the Court will ultimately opt for a standard that does not in all cases permit a bright line determination of the substantive rights limitation. Indeed, the Court has demonstrated little satisfaction with the bright line tests it has used in the past – from outcome determination to "really regulates procedure" to sensitivity to important state interests (and, for four justices, back again to "really regulates procedure"). But the ability to interpret a Rule narrowly to avoid a conflict with apparently substantive law must have limits if avoidance is to serve the purpose of protecting the separation of powers boundary established in the REA, and if, additionally, the Rules are to be construed uniformly in diversity and federal question cases.

Those limits can be found by further analogy to the statutory avoidance canon. A "cardinal principle" of the statutory avoidance canon is that when Congress's intent is clear, that intent, rather, than a limiting interpretation must govern.³⁷⁵ And, if a "saving" construction is not available, the Court must address the constitutional issue. So, too, in the REA context, the Supreme Court has often stated, when analogizing to a serious doubts model, that a limiting construction of a Federal Rule may be appropriate, but only "when it is fair to [construe narrowly]."³⁷⁶ Indeed, Justice Stevens, in his *Shady Grove* concurrence, has once

³⁷³ See *supra* note 320-321, and accompanying text.

³⁷⁴ See *supra* notes 331-332, and accompanying text.

³⁷⁵ See, e.g., Young, *supra* note 56, at 1576; see also *supra* note **Error! Bookmark not defined.**, and accompanying text.

³⁷⁶ See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38 (1988) (Scalia, J., dissenting) (indicating that courts should "assume when it is fair to do so that Congress is just as concerned as [the Court has been] . . . to avoid significant differences between state and federal courts in adjudicating claims" and that limiting constructions may be used "if the text permits"); *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in judgment) (stating that a limiting construction may be adopted "when the rule can reasonably be interpreted to avoid that impermissible result"); *Shady Grove*, 130 S. Ct. 1441-42 (Scalia, J., opinion of the Court) (recognizing, in dicta that a Rule may be narrowed to serve avoidance purposes if "susceptible of two meanings" but finding, on the facts of the case, that the Rule was unambiguous and in direct conflict with state law); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-45 (1999) (construing Rule more narrowly than text would require in light of "historical antecedents, the "Advisory Committee's expressions of understanding," and potential invalidity of Rule under the substantive rights limitation of the REA); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13, 620 (1997) (providing that a Rule's "requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right" and also that, in construing a Rule, courts "must be mindful that the Rule as now composed sets the

again concluded that, if a “rule can[not] be reasonably interpreted” to avoid arguable violation of the substantive rights limitation, then the Court must address whether the Rule is valid under the REA.³⁷⁷

Unfortunately, the Court has been less than consistent in determining when a narrowing construction would be “fair” or “reasonable” and has often declined to examine Rule history and Advisory Committee Notes when determining the appropriate reach of a Rule.³⁷⁸ Commentators have made a persuasive case that Rules should be interpreted in light of text and Advisory Committee Notes. Structurally, the case for reliance on Advisory Committee Notes has increased since the Notes have been subject to additional procedures in the rulemaking process, including that both the Rule text and Notes are submitted for public comment, both are subject to revision by the Advisory Committee and the Standing Committee, and both are submitted to the Supreme Court and Congress for approval.³⁷⁹ Furthermore, the Enabling Act process includes broad input, multiple decisionmakers, notice and comment periods, and opportunity for review by the Supreme Court and Congress.³⁸⁰ Indeed, Professor Bone has concluded that *Hanna’s* presumption of Rule validity is based on the “idea that the Rule has been vetted by the rulemaking process” and, thus, Rule interpretations that are not “sufficiently connected to the Rules as so vetted” should not be deemed presumptively valid.³⁸¹ Similarly, the Court’s failure to stay close to Rule text, history, and purposes as set forth in Advisory Committee Notes in applying an avoidance canon in *Erie* cases has permitted dueling interpretations of a single Rule in diversity and nondiversity cases.³⁸²

Pragmatically, the Court should also use text and Advisory Committee Notes to constrain the range of permissible saving constructions when using avoidance in

requirements they are bound to enforce”); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 543-44 & n.2 (1984) (Stevens, J., concurring in judgment) (noting that plain language and history of Rule supported construing Rule narrowly and not to conflict with a federal statute in the face of substantial doubt about the validity under the REA of a contrary construction).

³⁷⁷ *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in judgment).

³⁷⁸ See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 742-43 & nn.3-4 (1980); see also *Gaspirini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436-37 & n.22 (1996) (Court fails to address conflict issue until late in the case and makes no inquiry into context as provided in Advisory Committee materials); *Marek v. Chesny*, 473 U.S. 1 (1985) (in congressional statute-Federal Rule conflict, Court majority makes no inquiry into history of Rule, but uses a plain meaning construction that later research reveals to be inconsistent with Rule history and Advisory Committee Notes, see Bone, *To Encourage Settlement*, *supra* note 20, at 1615).

³⁷⁹ Struve, *supra* note 58, at 1112-14. See also Sellers, *supra* note 280, at 328-29. Alternatively, Professors Burbank and Wolff suggest a “more dynamic approach” to interpreting Federal Rules that would recognize a Rule’s text, history, and Advisory Committee Notes in determining the scope of a Rule but that the Court’s power extends as well to federal common lawmaking. Thus, in the context of construing a Federal Rule the Court’s power would emanate from the Rules as promulgated and from the Court’s power in federal common lawmaking. Burbank & Wolff, *supra* note 58, at 48-49.

³⁸⁰ *Id.*; Sellers, *supra* note 280, at 328-29. See also Bone, *To Encourage Settlement*, *supra* note 20, at 1615-17.

³⁸¹ Bone, *To Encourage Settlement*, *supra* note 20, at 1617.

³⁸² See, e.g., *Semtek*, 531 U.S. at 503-04; *Walker*, 446 U.S. at 742-43.

Erie cases because the Court has often relied on those sources in other REA contexts;³⁸³ because using different techniques for Rule interpretation in varying REA contexts leads to the “two plain meanings for Federal Rules” problem (one in diversity and one in federal question cases), experienced both in the outcome-determinative period and currently; and because, when it has not used these materials, the Court has permitted implausible Rule interpretations in both *Erie* and non-*Erie*, REA cases.³⁸⁴

Additionally, while I advocate attention to Rule interpretation for the limited purpose of restraining the range of permissible saving constructions that courts may adopt for Federal Rules, other commentators have suggested that attention to history and Advisory Committee context in Rule interpretation may, in fact, reveal enhanced Federal Rule competence, thereby potentially restricting the need to resort to avoidance principles. Thus, assessing Rule text and history as set forth in Advisory Committee Notes may assist both in cabinining the permissible range of limiting constructions of a Rule for avoidance purposes and in establishing greater breadth of a Rule. For example, Professors Dudley and Rutherglen note that Court attention to the history and Advisory Committee Notes regarding Fed. R. Civ. P. 59(a), in *Gaspirini v. Center for Humanities, Inc.*,³⁸⁵ would have established that Rule 59(a) “was no ordinary federal rule . . . but proceeded from the command of Congress to avoid any infringement of the right to jury trial under the Seventh Amendment.”³⁸⁶ They conclude that, if the *Gaspirini* Court had considered the history of Rule 59(a), it might have concluded that the Rule incorporated the provisions of a federal statute and that the Rule could be accorded the higher level of substantive competence accorded congressional statutes.³⁸⁷ More broadly, Professors Burbank and Wolff have suggested that the Court’s promulgation of open-textured Rules that leave normative choices to trial courts may provide a role for Supreme Court federal common lawmaking in Rule interpretation.³⁸⁸

³⁸³ See *supra* notes 228-258, and accompanying text.

³⁸⁴ See *supra* notes 187-198, discussing *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), and *supra* notes 212-258, discussing *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). See also Bone *supra* note 20, at 1615-16 (discussing implausible construction of Fed. R. Civ. P. 68 in *Marek v. Chesny*, 473 U.S. 1 (1985) when Court failed to look to history and Advisory Committee Notes).

³⁸⁵ 518 U.S. 415 (1996).

³⁸⁶ Dudley & Rutherglen, *supra* note 44, at 713-15. Professors Dudley and Rutherglen suggests as well that understanding the history and Advisory Committee information not only prevents improper limiting of Rule 59(a), it also establishes that the authority for Rule 59(a) comes from Congress itself and, thus, the Court could conclude that, if a Rule is premised on a federal statutes, there is no need to consider the substantive rights limitation since congressional statutes are subject only to constitutional validity requirements.

³⁸⁷ *Id.*

³⁸⁸ Burbank & Wolff, *supra* note 58, at 48-49 (advocating that unless a Federal Rule “actually makes a policy choice that Congress has had an opportunity to review [following its prescribed Enabling Act process] . . . the role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized” and emphasizing as well that “many, if not most, of the Federal Rules are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges”).

In summary, using a serious doubts analysis that tethers any limiting constructions of a Federal Rule to its text, history, and purposes as revealed in Advisory Committee Notes produces multiple benefits. First, it will permit the doubts canon to protect the often underenforced structural value of separation of powers that underlies the REA. Although this Article does not address the Rule validity standard, it is likely that any standard adopted by the Supreme Court will present the difficult line-drawing issues that are best protected through a doubts analysis, since the standard will likely seek to reconcile congressional intent to permit an integrated national procedural code while retaining for Congress substantive policy choices. The properly limited serious doubts canon will err on the side of protecting Congress's substantive prerogative in instances of doubt, but, when limited by text, history, and purposes as adduced in the Enabling Act process, it will stop short of permitting a "rewriting" of the Federal Rule. If Rule text and history do not permit a limiting construction, then the Court must proceed to the question of Rule validity. Second, by protecting Congress's substantive lawmaking choices, the court additionally protects federalism interests, but as the result of protecting Congress's substantive policy choices, not as the goal of avoidance. Third, it will protect Court rulemaking. Unbounded avoidance imposed to serve the goal of protecting state interests and regulatory policies permits differing interpretations for Federal Rules depending on whether the case is heard in state or federal court and threatens to return to the pre-*Byrd* and pre-*Hanna* era in which state procedural law was elevated above Federal Rules and federal statutes. Fourth, this serious doubts framework harmonizes the methodology for avoidance in *Erie* and non-*Erie* REA cases because in each REA context – Federal Rule-state law conflict, congressional statute-Federal Rule conflict, or in general Rule construction – the same issue of whether the Court Rule impinges impermissibly on Congress's rulemaking prerogative is raised.

I. CONCLUSION

The Court has long relied on avoidance to assist in policing the uncertain boundary of the substantive rights limitation of the REA, and, thus, to decide whether a Federal Rule or state law should prevail in event of an apparent Federal Rule-state law conflict. The Court's reliance on avoidance, however, has been inconsistent and improperly focused on federalism concerns. This Article suggests that use of avoidance remains appropriate, but it narrows instances of reliance on avoidance (1) by recognizing that "important state interests and regulatory powers" may not serve as the guiding principle of avoidance because the substantive rights limitation is premised on separation of powers purposes rather than federalism purposes; and (2) by limiting, through interpretation based on Rule text and Advisory Committee Notes, the available savings constructions for a Rule. Furthermore, the proposal to use a serious doubts method of avoidance recognizes the importance of the competing federal principles under the substantive rights limitation of the REA -- the integrity of the Federal Rules as a coherent system and the preservation to Congress of substantive lawmaking authority. Nevertheless, in instances of serious doubt as to whether a Federal Rule violates the substantive

rights limitation, it recognizes that the REA limitation regarding separation of powers is part of the “constitution outside the Constitution”³⁸⁹ and that the constitutional and statutory value should be protected.

³⁸⁹ Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CAL. L. REV. 1371, 1372-73 (2010).